بسم اللہ الرحمٰن الرحیم

Islamic Law

The:Distinguishing Features

as Compared with the un-Islamic legal Systems of the World

(Being a brief comparative study of the sacred law of Islam and the un-Islamic laws of the world)

Volume 1-2

By

MUFTI AKHTAR IMAM ADIL QASMI

Translated from the Urdu

By

Md. Ibrahim Khan

MA (English), PGDTE , CIEFL (Hyderabad)

Published by

Mufti Zafiruddin Academy

JAMIA RABBANI

Manorwa Sharif, Samastipur 848207, Bihar,India

© Jamia Rabbani, Manorwa Sharif, Samastipur, Bihar.

Name of Urdu Title : Qawanin-e-Alam mein Islami Qanoon Ka Imtiyaz
By : Maulana Mufti Akhtar Imam Adil Qasmi

Name of English Title : Islamic Law :Distinguishing Features as compared with the un-Islamic legal systems of the World.
Total pages : 757
Vol 1 : 403
Vol 2 : 354

Translated from the Urdu : Md. Ibrahim Khan
MA (English), PGDTE,CIEFL (Hyderabad)

Publisher :Mufti Zafiruddin Academy ,Jamia Rabbani, Manorwa Sharif,Samastipur,848207 Bihar ,India,Contact No.0091-9934082422-9473136822 ,email:jamia.rabbani@gmail.com, jamiarabbani@rediffmail.com, www.jamiarabbani.org
Published : Nov. 2014 ,Zil Hijjah 1435 Hijri
Stockist: Rajat Publications Publishers & Distributors , 4740/23 Ansari Road ,New Delhi 2 (india)
Tel : +91-11-23267924- Mob.+91-9811484973,+91-9811105389 ,E-mail rajat_publications@yahoo.com

Price : Rs. 1495.00

بسم اللّٰه الرحمٰن الرحيم

۞ وَمَا كَانَ ٱلْمُؤْمِنُونَ لِيَنفِرُوا۟ كَآفَّةً ۚ فَلَوْلَا نَفَرَ مِن كُلِّ فِرْقَةٍ
مِّنْهُمْ طَآيِفَةٌ لِّيَتَفَقَّهُوا۟ فِى ٱلدِّينِ وَلِيُنذِرُوا۟ قَوْمَهُمْ إِذَا رَجَعُوٓا۟
إِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُونَ ﴿١٢٢﴾

And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn their people when they return to them that they might be cautious. (9:122)

مَنْ يُرِدِ اللّٰهُ بِهٖ خَيْرًا يُفَقِّهْهُ فِي الدِّيْنِ ⟨أخرجه البخاری و مسلم⟩

Whom Allah wishes doing of good, grants him deep understandings of the *Din* (Islam). (Bukhari and Muslim)

TABLE OF CONTENTS

بسم اللّٰه الرحمٰن الرحیم 1

Islamic Law : Distinguishing Features as Compared with the un-Islamic legal Systems of the World.. 1

Name of English Title : Islamic Law Distinguishing Features of as......................

compared with the un-Islamic legal systems of the World. 2

Dedication to :.. 25

OPINIONS AND REVIEWS ON THE URDU EDITION OF MAULANA MUFTI AKHTAR IMAM ADIL'S MAGNUM OPUS *QAWANINE ALAM MEI ISLAMI QANUN KA IMTIYAZ*.. 26

A GREAT BOOK ON THE LAW OF ISLAM.. 28

Maulana Md. Asrarul Haque Qasmi…………………………………………......30

Maulana Khalid Saifullah Rahmani , Secretary General,Islamic Fiqah Accademy Delhi,India. 32

Maulana Sayyed Md. Rabe Al Hasani Al Nadwi……………………………......37

A COMPENDIUM OF ISLAMIC FIQH. 38

Dr. Md. Manzur Alam ……………………………………………………......39

Maulana Azizul Hasan Siddiqui……………………………………….…..40

Dr. Saeedul Azmi Nadwi Editor -in-Chief Arbic monthly Al Basi - Islami…….41

Hazrat Maulana Sayyed As'ad Madani Formerly Amirul Hind and ex-President Jamiat Ulama-e-Hind…………………………………………………..……42

Reviews and Opinions of the great and noted men of Islamic scholarship on the original Urdu book *Qawanin-e-Alam me Islami Qanun ka Imtiyaz* ….

Amir-e-Shariat Haz Maulana Sayyid Nizamuddin Sb. Secretary General, All India Muslim Personal Law Board .... ….…43

Hazrat Maulana Md.Salim Al-Qasmi……………………………………..45

Opinion of the grand teacher Haz. Maulana Sayyed Anzar Shah Kashmiri.... 47

'An Encyclopedic work' Opinion of the great Muhaddith Haz. Maulana Mufti Saeed Ahmad Palanpuri 48

Valuable opinion of Maulana Dr. Abdullah Abbas Nadwi 50

PREFACE By Hazrat Maulana Mufti Md. Zafirud Din Miftahi 52

Maulana Allama Md. Nimatullah Azami 52

AUTHOR'S PREFACE TO THE URDU EDITION 55

Causes of Decadence..........55.
A broken-hearted's wish 56
Brief Account of my Fiqhi Voyage.......... 57
Organization of the material 59

ACKNOWLEDGEMENT 60

TRANSLATOR'S NOTE 62

SECTION-ONE..........64

CHAPTER 1..........65

Beginning of the Concept of Law 65
Origin of the man-made law 65
The origin of the Law of Islam.......... 65

CHAPTER 2..........69

ARABS BEFORE ISLAM 69
Social and Economic Condition 69

Their Religious Condition.......... .70
Their Condition of Knowledge 72
Legal Condition of Arab Society 75
The Chief and his functions 75
Things were tending towards settled Government at Makkah 76
What happened in the case of an offence committed by a member of one tribe against a member of another tribe? 76
Procedure 77
Oaths 78
Customs regulating relations between the sexes; Temporary or *mut'a* marriage. 78

Dower 79
Woman was not a free agent in marriage 80
No restriction as to the number of wives 80
Prohibited degrees 80
Divorce Talaq; *Ila* 81
Khula' 81
Effect of divorce; Iddat 81
Legitimacy 82
Child by adoption 82
Female infanticide 82
Tenure of property 82
Power of alienation; Different forms of sale 83
Leases 84
Loans, riba or usury 85
Testamentary dispositions of property 85
Succession and inheritance 85
Punishments 86
CHAPTER 3 88

LAW AND THE JURISPRUDENTS OF WEST 88

The Law: Contradicting Theories 88
Schools of Law 89
Bentham's Philosophy 90
Greek Philosophers 91
NATURAL LAW 92
Historical Background 92
Law of Fairness 93
Justice 93
Human Reason 93
Stoic Philosophers 94
Destruction of Natural Law 95
POSITIVE LAW 97
What is Positivism? 97
Austin's Theory of Law (Analytic Positivism) 98
Kelsen's Pure Theory of Law 99
Critics of Kelsen's Theory 100
Critics of Austin's Theory 100
Pragmatic Positivism 101
CHAPTER 4 102

PHILOSOPHY OF LAW 102

The Supreme End 102
Ideal of Justice 102
Basic Types of Justice 103

Social Control 104
Perfect Law 105
Defeat of Legal Philosophy 106

CHAPTER -5.. 108

DISTINCTIVE FEATURES OF ISLAMIC LAW 108

(a) ....Islamic Law is the Command of Allah.108
(b) Sovereignty 108
(c) Ideal Law (Perfect and for all times) 110
Jackson's View : 110
Gibb's View: 111
(d) ....Pre-Islamic Background 112
(e) ....Reforms 113
Islamic Shari'ah : A Universal Law.. .115
Equality in the Shari'ah .... .125
Impediments to Equality 128
Freedom in the Shari'ah .... .132
Shari'ah is About Essences and Real Attributes, Not Names and Forms ...... .145
Precision and Determination in Islamic Law 147
The Merciful Nature of the Shari'ah 151
The Shari'ah's Aim in Building a Solid and Stable Social Order 153

Chapter 6..155

Determining the Meaning of Fiqh 155

Earlier General Meaning of Fiqh 156
Shift in the Definition of Fiqh 157
Analysis of the Definitions of Fiqh 157
Distinction Based on the Definition 160
Distinction between Shariah and Fiqh 160
CHAPTER 7 161
THE MEANING OF QANUN (LAW) 161
The science of sources and the legal (sharai) rule 162
The definition of the science of jurisprudence (fiqh) 164
Islamic Jurisprudence: a Religious and a Legal System 165
The division of the science of jurisprudence 166
Division of modern laws 168
The Nature of Islamic Law (Shari'ah) 168
Diverse Views 169
Justice as a Sacred Trust 171
Islamic Justice 172
Absolute Standards of justice 173
Order and Peace 174
Fear of God (Taqwa) 175
Purification of Soul (Tazkiat al-Nafs) 176

Self-Sacrifice 176
Righteousness 177
Law of Equality (Qisas) 178
Shari'ah-A Beacon Light 179
Shari'ah-a Criterion 180
Antinomies 180
Stability and Change 181
Reason and Revelation 181
Collectivism and Individualism 182
Positivism and Idealism 184
CHAPTER 8 186

Islamic Law: an Assessment of its age-wise development over successive periods of the history with a brief survey of the respective features 186

Introduction 186
The First Age: The Age of the Prophet (peace be upon him) 187
The Second Age: The Age of the Khilafat-e-Rashidah (the earliest phase of the Caliphate) 196
Third Age : (From the First Century of Hijrah up to the Beginning of the Second century of Hijrah) 198
The Fourth Age : (From the Beginning of the Second Century till the Mid of the Fourth Century of Hijrah) 201

THE HANAFI SCHOOL 201

The Great Imam 201
Exercise of Reason 203
The School of Kufah 207
Contribution of Abu Hanifah 208
The Companions of Abu Hanifah and the books of Zahir al-Riwayah 210
The works of the pupils and those who came after them 212

THE MALIKI SCHOOL 213

The Imam of the Madina 213
His Pupils and followers 215

THE SHAFI'I SCHOOL 216

The Imam al-Shafi'i 216
His works 216
His students and followers 218

THE HANBALI SCHOOL 219

The Imam and his pupils 219
Notable Characteristics of this Age 221

CHAPTER 9 222

FIFTH AGE AND ITS CHIEF CHARACTERISTICS (From the middle of the fourth century A.H. upto the middle of the seventh century A.H.) 222

Sixth Age : This age takes its start from the middle of the seventh century A.H. and lasts till the eighties of the thirteenth century A.H. 224
Editing and compilation of Juristic applications and preparation of the books on al *fatawa* 225
The legality of some juristic rulings emanating from the Sovereign 225
Aspects of legislation 226
The limits of the sultan's jurisdiction 228

The Extinct Sunni Schools 230

Al-Awza'i School 230
The Zahiri School 231
The Tabari School 232

THE SHI'AH SCHOOLS 232

The People of Shi'ah 232
The Imamiyah Shiah 233
The Zaydiyah Shiah 234
The Ismailiyah Shiah 235

CHAPTER 10 237

SEVENTH AGE : OTTOMAN LAWS AND THE MAJALLAH 237

The idea of official codification 237
The attempts of Ibn al-Muqaffa and Abu Ja'far al-Mansur 238

CHAPTER 11 240

THE ALAMGIRIYAH 240

The Sources of the Fatawa Alamgiri 240
Sharh Waqaya 240
Quduri 241
Qinayatul Manyah 241
Al-Kafi 241
Al-Hidayah 241
Muniyatul Musalli 241
Mukhtasar al-Tahavi 241
Fathul-Qadir 241
Muhit Burhani 242

Muhit al-Sarkhasi 242
Al-Mabsut 242
Jame Kabir Husaidi 242
Al-Jame-us-Saghir 242
Al-Nawazil 242
Al-Sirajul-Wahhaj 242
Al-Mukhtar 242
Al-Zakhirah 243
Ghayathul Bayan 243
Al Burjundi 243
Badai-us-Sanai 243
By Shaikh Allaud-Din al-Kasani 243
Jamiul-Muzmarat 243
Al-Bahrur Raiq 243
Al-Yanabie 244
Al-Niqayah 244
Al-Zaid 244
Al-Inayah (in two volumes) 244
Al-Tahzib 244
Al-Muntaqa 244
Al-Zahiriyyah 244
Al-Ikhtiyar 244
Fatawa Tatar Khaniyah 245
Fatawa Ghayathiyah 245
Khulasah Fatawa Qadhi Khan 245
Tambatul Haqaiq 245
Meraj-al-Dirayah 245
Al-Kifayah 245
Fatawa al-Bazzaziyah 245
Fatawa-al-Sughra 245
Fatawa-al-Kubra 245
Khizanatul-Fatawa 246
Mukhtar-al-Fatwa 246
Fatawa Sirajiyah 246
Khizanah-al-Muftiyeen 246
Al-Nahr-al-faiq 246
Kanz-al-Daqaiq 246
Al- Tanwir 246
Fatawa Nasafiyyah 247
Al-Sarakhsi 247
The constituent Ulama of the Compilation Committee and the names of the ulama sharing the task of compilation of the *fatawa* 247
Translations of the Fatawa Alamgiri 249
Alamgiri's English Translation 249
Its Urdu translation 249

The Majallah 250
The Contents of the Majallah.......... 251
Commentaries on the Majallah 253

CHAPTER 12..........255
THE LEGISLATIVE MOVEMENTS IN EASTERN COUNTRIES..... 255

The Majallah in the Modern era.......... 255
Pakistan and India 255
Egypt.......... 256
Turkey.......... 261
The Lebanese Republic.......... 262

SECTION-TWO.......... 267

CHAPTER 13..........267
DISPELLING DOUBTS AND REMOVING MISAPPREHENSIONS ABOUT THE LAW OF ISLAM 267

Rights of the Dhimmis.......... 267
Treatment of Christians and Persians as Aliens 267
Assessment of the *Dhimmis*.......... 269
Consultation with the *Dhimmis* in Administration of their Matters 269
Fulfillment of Terms with the Dhimmis 270
Freedom in Religious Matters 271
Equal Civil Rights to Dhimmis and Muslims 272
Honour and Self-Respect of the Dhimmis Maintained.......... 273
Treatment of Dhimmis Conspiring or in Revolt.......... 273
Allegation of Unjust Treatment of the Dhimmis 274
Expulsion of Jews and Christians 277
Jiziyah 278

CHAPTER 14..........281
POLYGAMY A dispassionate investigation and assessment of the objections raised against the familial law of Islam 281

Man's Inclination to Polygamy 282
Polygamy Is Man's Need 282
Polygamy : an Advantage to the Woman.......... 283
Polygamy as a Social Need 283
Woman cannot Put up with Polyandry 284
Polygamy does not for Debauchery 286
Justification of Polygamy 287
Legal Restrictions.......... 288
Limitation of Four 288
Only Permission, not an Injunction.......... 288

Some Conditions and Safeguards 289
Family Planning and Islam 293
Fear of Economic Scarcity 294
The Phantom of Scarcity 297
Population Rise Not a Problem 298
The Real Population Planning 299
Why Family and Not Population Planning 302
Paving the Way for Family Planning 303
Consequences and Results 303
National Movement or Individual Expediency 306
The Islamic Standpoint 307

CHAPTER 15 310

MAINTENACE OF THE MUSLIM DIVORCED WOMEN, WHAT LIES BEHIND THE MISUNDERSTANDING? 310

The Solutions which Islam offers 313
Divorce and Separation Laws in the West 315

CHAPTER 16 326
ISLAMIC FIQH : AN OVERALL EVALUATION 326

Sources of Islamic Law 327

CHAPTER 17 332
RELIGIOUS TOLERANCE IN ISLAM AND THE ROLE OF AURANGZEB AND TIPU SULTAN 332

REFERENCES : 350
Is Islamic Law Out of Harmony with Contemporary Conditions? 351
The Fallacy of Analogy between the Islamic Law and the Man-made Law... 352
A False Syllogism 352
The Evolution of Customary Laws 353
No Similarity between Islamic Law and the Man-made Conventional Law.. 355
Fundamental Difference between the Islamic Law and Human Law 355
The Essential Qualities of Islamic Law which distinguish it from other laws:- 362
(a) .... Perfection 363
(b) .... Sublimity 363
(c) .... Permanence 363
The Proof of Above Qualities in Shariah 363
The Doctrine of Equality 364
Equality between Man and Woman 365
Doctrine of liberty 367
Freedom of Thought 367
Freedom of Belief 370
Freedom of Speech 372

The Doctrine of Consultation 376
Limiting the powers of the governing authority 380
Principle No.1: Limitations of Ruler's Powers 381
Principle No. 2: Concept of Ruler's 383
Accountability for his Transgressions and faults 383
Principle No.3: The People's Right to remove the ruler 383
The Conception of Divorce 385
Divorce Prior to Consummation and Determination of Dowry 386
Divorce Before Consummation and after the Determination of Dowry 386
Divorce after Consummation 387
The Concept of Prohibition 389
The concept of Polygamy 391
Evidence and Contract 393
The concept of written evidence 394
Evidence of Commercial Transactions 396
Text of contract shall be dictated by the obligor 398
Refusal to bear witness improper 400
Other Injunctions contained in the verse relating to a contract of debt 401
A word of Advice 401
Mode of Discussion 403

CHAPTER 18 404

NATURE AND TEMPERAMENT OF THE ISLAMIC LAW 404

Primary Constituents of the Islamic Shariat 410

CHAPTER 19 415

AN EXPOSITION OF THE ISLAMIC LAW 415

Fundamental Constituents of the Law of Islam according to modern terminology 415
1.Fiqh al-Usrah (the laws regulating family) 415
2.Financial Dealings 416
3.Procedural Law of Islam 416
4.Special International Laws 416
5.The Constitutional Law 417
6.Financial Law 417
7.International Law 418
8.*Uqubat* (Penal Code) 418
A Topic-wise comparison between the Islamic Law and the Contemporary Secular laws 419
Important subjects of the dealings 419
Difference between the Devotionals and the Dealings 420
A nutshell analysis of different sections of the man-made legal systems 421
The Specific law 422

Fiqhi Corpus and the Subjects of the Man-made Laws 423
International Law of Islam.. 423

CHAPTER 20 425

THE NORMATIVE PRINCIPLES UNDERLYING THE INTERNATIONAL LAW OF ISLAM 425

Unity of all Human Beings 425
Constructive Cooperation... 425
Overlooking and Forgiving 425
Freedom of Belief and Creed.. 426
Indiscriminate Justice 427
International Law Began with Islam 430
Early Works on International Law 432
Contribution of Abu Hanifah and his Students... 434
Other Eminent Jurists.. 435
Contents of Inernational Law.. 436

CHAPTER 21 439

CONCEPT OF WAR IN ISLAM AND UN-ISLAM AND THE CAUSES LEADING TO WAR.. 439

Definition of war in the Law of Islam 439
Causes of war as reflected in the Law of Islam.. 440
Defensive war.. 440
Sorts of the war of defence as reflected in the Qur'an and Sunnah.................. 443
Defending oneself against oppression and transgression 443
Removing obstacles against access to the path of Allah.................................. 445
Taking stern punitive measures against treachery and breach of confidence 445
Getting rid of the internal enemies 447
Maintaining internal peace and security 453
Supporting the wronged Muslims... 455
Maintaining internal peace and security 457
Clear definition of the objectives and causes of war 459
Purging the ways of war of un-Islamic and inhuman practices....................... 462
Unambiguous distinction between the combatants and the non-combatants 462
Disabled are not subject to killing... 463

CHAPTER 22 465

Rights of the Combatants and how to treat them during and after war....... 465

Prohibition of taking the enemy by surprise.. 465
Prohibitions of killing the enemy by fire 465

Prohibition of killing the enemy by fettering him 466
Prohibition of plundering 467
Important note 468
Prohibition of wanton destruction 469
Important Note 469
Prohibition of mutilating the slain enemy 470
Prohibition of killing the captives 471

CHAPTER 23 472

ISLAMIC FIQH AND THE ROMAN LAW AND THE POINTS OF DIVERGENCE BETWEEN THE TWO 472

Various views 472
The extent of the similarities between the two systems 474
Significance of Similarities in Themselves 476
The Attitude of the Muslim Jurists towards Roman Law 478
The Relationship to Hebrew law 479
Roman Customs in Conquered Territories 480
Conclusion 481

SECTION-THREE 483

BRIEF INTRODUCTION TO SOME UNISLAMIC CONSTITUTIONS AND LAWS 483

CHAPTER 24 483

THE CONSTITUTION OF THE GREAT BRITAIN AND THE NATURE OF THE CONSTITUTION 484

Does Britain Have a Constitution? 484
Sources of the English Constitution 485
(1) Conventions 485
(2) Charters 485
(3) Statutes 486
(4)Judicial Decisions 487
(5)Eminent Works 487
(6)Common Law 487

SALIENT FEATURES OF THE ENGLISH CONSTITUTION 488

(1)Partly Written and Partly Unwritten 488
(2)Evolutionary 488
(3) Difference between Theory and Practice 489
(4) Parliamentary Sovereignty 489
(5)A Unitary Constitution 490
(6)A Flexible Constitution 490

(7) Rule of Law 491
(8)A Parliamentary Form of Government 491
(9)Separation of Powers combined with Concentration of Responsibility 492
(10) A Blend of Monarchy, Aristocracy and Democracy 492
(11) A Bicameral Legislature 493

CRIMES AND PUNISHMENT IN ENGLAND DURING THE MIDDLE AGES493

Forms of torture of the Church 494
Head Device.. 494
Forms of Torture 495
More forms of Torture.. 495
TOWER OF LONDON 496
Stocks and pillories; the Humiliation 497
Crimes in the Middle Ages 498
Crime Ratio during the Middle Ages 498
Witches and Their Punishment.. 499
The Crown 499
Distinction between the King and the Crown.. 499
Succession to the Throne.. 501
Powers of the Crown 502

THE KING CAN DO NO WRONG.. 505

The Justification of Monarchy 506
Royal Influence of the King 507
Leadership of the British Nation.. 508
King as Symbol of Commonwealth Unity 509
The British Parliament.. 509
Sovereignty of Parliament 510
Dicey's Interpretation 511
Limitations on Parliamentary Sovereignty.. 512
(1) Moral Limitations.. 512
(2) Rule of Law 513
(3)Public Opinion.. 513
(4)Statute of Westminster.. 513
(5)International Law 513
(6) Judge-made Law.. 514
(7) Delegated Legislation 514

THE HOUSE OF COMMONS (HOC).. 514

Organisation 515

POWERS AND FUNCTIONS OF THE HOUSE OF COMMONS.. 517

(1) Legislative Functions 517

(2) Financial Powers 517
(3) Control over the Executive 518
Law-making Procedure 519
The British Parliament: House of Lords 520
Composition of the House of Lords 520
(1)Princes of the Royal Blood 520
(2)Hereditary Peers 521
(3)Representative Peers of Scotland 521
(4)Representative Peers of Ireland 521
(5)Lords of Appeal in Ordinary (Law Lords) 521
(6)Lords Spiritual 522
(7) Life Peers 522
The Latest Composition 522
Lord Chancellor 523
Functions of Lord Chancellor (now Lord Chief Justice) 523
Committee System 524
Powers and Functions of the House of Lords 524

THE PARLIAMENT ACT OF 1911 AND ECLIPSE OF POWER OF LORDS 525

Before the passage of Act of 1911, the House of Lords had co-equal and coordinate powers with the House of Commons. 525
Provisions of 1911 Act 526
Act of 1949 527
The House of Lords—an analytical appraisal 528
(1) Political Anachronism 528
(2) Fortress of Wealth 529
(3) Bipartisan 529
(4)Irregular Attendance 529

CHAPTER 25 531

CONSTITUTION OF USA, BACKGROUND, SALIENT FEATURES 531

Introduction 531
Land and the People 531
Production and Industry 532
Education 532
Religion 532
Constitutional Development 533
The Declaration of Independence 533
Establishment of Confederation 534
The Philadelphia Convention 535

SALIENT FEATURES OF THE AMERICAN CONSTITUTION 537

(1) Written Character 537

(2) Rigidity 538
(3) Federal Character 538
(4) Supremacy of the Constitution 538
(5) Separation of Powers 539
(6) Checks and Balances 539
(7) Bill of Rights 540
(8) Judicial Review 540
(9) Republicanism 540
(10) Presidential Form of Government 540
(11) Dual Citizenship 541
(12) Popular Sovereignty 541
(13) Spoils System 541
(14) Bicameral Legislature 542
Growth of the Constitution 542
(1) Amendments 542
(2) Laws 543
(3) Judicial Interpretation 544
(4) Development by Executive 544
(5) Conventions 545

THE AMERICAN FEDERATION, SEPARATION OF POWER AND CHECKS AND BALANCES 547

Division of Powers 547
The Status of States in the American Federal System 548
Federal Guarantees of the States 548
(1) Respect for Territorial Integrity 549
(2) Guarantee of a Republican Form of Government 549
(3) Protection against Invasion and Civil Commotion 549
(4) Obligation of States towards Federal Government 549
Growth of Federal Authority 550

AMENDMENT OF THE CONSTITUTION 553

Criticism of Amendment Procedure 553
Separation of Powers 555
Checks and Balances 555

CHAPTER 26 558

THE CONSTITUTION OF SWITZERLAND BACKGROUND SALIENT FEATURES 558

Introduction 558
The Old Confederation 559
The Constitution of 1848 560
The Constitution of 1874 561

The Constitution of 1999 561

MAIN FEATURES OF THE SWISS CONSTITUTION 562

A Written and Lengthy Constitution 562
(1) Through Referendum 563
(2) Through Constitutional Initiative .... 563.
A Republican Constitution 564
A Federal Form of Government 565
Democratic Character of the Swiss Government 567
Liberalism 567
Swiss Constitution and Citizen's Rights 568
Plural Executive 569
Secondary Position of the Judiciary 569
Bicameral Legislature 569
A Dynamic Constitution 570

RIGHTS (AS PER 1999 CONSTITUTION) 570

(1) Right to Citizenship 570
(2) Right to Move 571
(3) Equality before Law 571
(4) Right to Press, Association and Petition 571
(5) Right to Petition 571
(6) Free Education 571
(7) Right to Religion 572
(8) A neutralised State 572

CHAPTER 27 573

THE FRENCH CONSTITUTION AND ITS SALIENT FEATURES 573

Historical Background 573
The French Revolution, 1789 573
Second Republic (1848-51) 574
Third Republic (1870-1940) 574
Fourth Republic (1944-58) 576
Fifth Republic (1958) 580

IMPORTANT FEATURES OF THE CONSTITUTION 581

(1) Preamble 581
(2) Provision of Administrative Law and Administrative Courts 582
(4) Popular Sovereignty 582
(5) Rigid Constitution 582
(6) A Mixture of Parliamentary and Presidential forms 583
(7) Separation of Legislative and Executive Powers 584

(8) The Constitutional Council 584
(9) The Community 585
(10) Advisory and Judicial Organs 585
(11) Political Parties Recognised 587
(12) Untidy, Vague and Ambiguous 587

CHAPTER 28 588

THE CONSTITUTION OF JAPAN AND ITS SALIENT FEATURES 588

Introduction 588
Development of Japan's Constitution 590
Feudalism 591
Salient Features of the Japanese Feudal System 591
Post-Feudal Period 593
Salient Features of the Meiji Constitution 595
(1) Written and Brief 595
(2) Imperial Government 596
(3) Fundamental Rights 596
(4) Bicameral Legislatures 597
(5) Privy Council 597
(6) The Cabinet 598
(7) Rigid Constitution 598

GENERAL FEATURES 601

Written Constitution 601
Sovereignty of the People 601
Rigid Constitution 602
Renunciation of War 602
Limited Monarchy 603
Parliamentary Government 603
Unitary Government 603
Bicameral System 603
End of Dualism 604
Fundamental Rights 604
Independence of Judiciary 605
Adult Suffrage 605
Supreme Law 605
Local Autonomy 606

CHAPTER 29 607

THE CONSTITUTION OF CANADA 607

Introduction 607
Constitution Act 1982 609

FEATURES OF CONSTITUTION 610

Salient Features 610
(1) Written 610
(2) Rigidity-cum-Flexibility 611
(3) A Federal Constitution 612
(4) Equalisation 614
(5) Parliamentary Government 614
(6) Supreme Court 614
(7) A Fully Sovereign State 614
(8) Bilingualism 615
(9) A bicameral legislature 615
(10) Charter of Rights and Freedoms 615
Provision of Referendum 616

THE JUDICIAL SYSTEM 618

The Provincial Courts 618
The Federal Courts 619
Supreme Court 619
It's Jurisdiction 619

CHAPTER 30 622

THE CONSTITUTION OF AUSTRALIA 622

Historical Background 622
Geography 622
Transfer of Power 622
Towards a Federal Idea 623
Making of the Federation 626

THE MAIN FEATURE 626

Preamble 626
A Union between Independent States 626
A Federal Constitution 627
Parliamentary Government 628
Civil Liberties 628
Rigid Constitution 629
Equal Representation in the Senate 630
Independent Judiciary 630
Separation of Powers 630
States' Constitutions 631
Inter-State Commission 631

CHAPTER 31 632

THE CONSTITUTION OF THE RUSSIAN FEDERATION 632

Historical Background 632
Revolution of 1905 632
The Fate of Duma 632
The Great War and Its Influence on Russia 633
The February Revolution 634
The Provisional Government 634
The October Revolution 635
Post-Revolution Developments 636
1918 Constitution 636
1924 Constitution 636
The Stalin Constitution (1936) 638
The Brezhnev Constitution (1977) 638
1988 Constitutional Changes and After 639
Power Structure before Collapse of Soviet Union 640
Historic Decision of September 5, 1991 640
Commonwealth of Independent States (December 21, 1991) 642
Blow to Gorbachev and Resignation 642
The Latest Events 643
Putin's era December 28, 2006 643
August 14, 2008 Deal with Georgia 644
Introduction 644
Government in Brief 644
Political Parties 645
Preamble of the Constitution 645

SALIENT FEATURES OF THE CONSTUTION 645

Written 645
A Sovereign Democratic Federal Republic. 646
Incorporation of Rights and Duties (Articles 57-59) 646
Presidential Form of Government 647

Bicameral Legislature 647

Russian Government 648

Significant Role of Judiciary 648
Rigidity of the Constitution 648
Supremacy of Constitution 649
Sovereignty of People 649
Provision of State Principles 650
Conclusion 650
Constitutional Amendments 651
How are proposals made? 651
Exceptions 651

Appraisal of amending procedure 652

RIGHT AND DUTIES 652

A. Civil Rights 653
Right to equality (Article 19) 653
Right to Life (Article 20) 653
Human Dignity (Article 21) 653
Personal Freedom (Article 22) 654
Right to Privacy (Article 23) 654
Access to Material affecting Liberties (Article 24) 654
Privacy of House (Article 25) 654
Right of Choice of Native language and National Identity 654
Freedom of Movement and Residence (Article 27) 654
Right to Religion (Article 28) 655
Freedom of Thought and Expression (Article 29) 655
Right to Association, Demonstrations (Articles 30, 31) 655
B. Political Rights 656
C. Economic Rights (Articles 34 to 37) 656
D. Social Rights (Articles 38-44) 656
Article 39 657
Article 40 657
Article 41 657
Article 42 657
Article 43 657
Article 44 658
Article 48 658
Article 49 658
Article 50 658
Article 51 658
Article 53 658
Article 54 658
Restrictions 659
Duties (Articles 57 to 62) 659
Article 57 659
Article 58 659
Article 59 659
Article 62 659
Evaluation 659

CHAPTER 32 .... **661**

.. HISTORICAL BACKGROUND OF THE INDIAN CONSTITUTION AND ITS DISTINCT FEATURES 661
Drawn from different sources 661

Supplemented by multiple amendments, an d practically recast by the 42nd, 43rd and 44th Amendments, 1976-78. 662
The longest known constitution.......... 662
Incorporates the accumulated experience of different Constitutions.......... 662
Detailed administrative provisions included. 663
Peculiarity of the Problems to be solved.......... 664
Constitution of the Units also included. 664
Special provisions for Jammu & Kashmir 664
Nagaland, Sikkim, etc. 664
Federal Relations elaborately dealt with.......... 665
Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles and Fundamental Duties. 665
More Flexible than Rigid.......... 666
Legislation as supplementing the Constitution. 666
Reconciliation of a written Constitution with Parliamentary sovereignty. 668
Role of Conventions under the Constitution 669
Fundamental Rights, & Constitutional Remedies 669
Judicial review makes the Constitution legalilstic 670
Compromise between Judicial Review and Parliamentary Supremacy.......... 672
Fundamental rights subject to reasonable regulation by Legislature. 674
.... CRITICAL OVERVIEW OF THE AFOREMENTIONED MAJOR LEGAL SYSTEMS 674

SECTION-FOUR…………………………………………………………681

Glossary of Islamic Legal and General Juristic Terms 681
SELECT BIOGRAPHICAL NOTES 709
BIBLIOGRAPHY 736

Dedication to :

- **The Instructor of Humanity, the noblest of those of old and those of latter times, Imamul Ambia Haz Muhammad, the Messenger of Allah (peace and blessings of Allah be upon him), through the agency of whom the world was able to receive a perfect, unequalled, and universal system of law, which is fully capable of meeting all needs of all times till the end of time, without undergoing changes and amendments.**
- **To the Light of the Ummah, head of the Fuqah, Abu Hanifa, the Grand Imam, who expounded the best and authentic interpretation of the law of Islam, and whose legal explanations and Fiqh academy brought a legal revolution to the world;**
- **To all great *mujtahidin* and the *Fuqaha* of the *Ummah*, who devoted their entire lives to the service of the Islamic Fiqh, and whose painstaking efforts and tireless endeavors brought to existence a magnificent stock of material on the law of Islam.**

  Only Allah is asked to reward them all on behalf of us and Muslims.

OPINIONS AND REVIEWS ON THE URDU EDITION OF MAULANA MUFTI AKHTAR IMAM ADIL'S MAGNUM OPUS *QAWANINE ALAM MEI ISLAMI QANUN KA IMTIYAZ*

Maulana Mufti Akhtar Imam Adil's latest compilation is not so great in terms of magnitude; it is only of two volumes of modest magnitude, yet it is so comprehensive and compendious that it has indeed become a book of encyclopaedic character whose contents range from a satisfying explanation of the outstanding features of the sacred law of Islam to the dispelling of doubts and misunderstandings commonly found in the people, both Muslims and non-Muslims alike. The book simultaneously offers a good material on the comparative study of the law of Islam and the secular laws of the world. It furnishes a very useful list of the important books on the sacred law of Islam and mentions hundreds of Islamic justice terms.

So far as I think, the learned author is well aware of the demands of the time. He has come up with a befitting answer to the challenge which the Divine law of Islam and the Islamic teachings are faced with. Much as the world has been benefiting from the blessings of Islam and its teachings, yet with an obstinate attitude of ungratefulness. The author deserves our deeper thanks and congratulations for undertaking such an onerous task, and taking over a work so great as to engage a team of academicians for years. This great academic work will win admiration and appreciation of the people of scholarship. Side by side the learned author, all those who assisted and supported him by any way to bring the book to lighted deserve our deeper thanks.

A peculiarity characteristic of the Indian Ulama is that they have been undertaking great academic works, their life of resourcelessness and destitution notwithstanding. They have been doing so only for the sake of Allah and His religion with no worldly or other base motivation behind. For undertaking this great work the author has established his merit and entitlement to attract a doctorate degree. Those associated with the Madrasa Dinnia Ghazipur (U.P.) feel very much pleased to see that the learned author is the prominent one from among its able alumni. He himself takes pride in being a beneficiary of this seminary. May Allah make him beneficent for all and enhance his beneficences. We are rightly hopeful that the learned author will continue his academic endeavour and by authoring scholarly books will be winning admiration of the world of scholarship. We are glad to see Mufti Akhtar Imam Adil to be prominently ranked in the new emerging men of Islamic scholarship. His scholarship reminds us of the high standard scholarship of the Ulama of the past who in themselves combined more than one aspects of learning. They were good orators, and at the same time, good authors and the men of and literature and with their presence remained alive the traditions of truth-speaking. In the learned author we see those high traditions of learning and scholarship. For him we wish a bright and successful future.

(Reviewed by Tazkir (Urdu) an academic journal,
published from Ghazipur (U.P. (India))

A GREAT BOOK ON THE LAW OF ISLAM

Islamic law is highly important and multidimensional subject of academic study. It has engaged best minds and innumerable people of outstanding intelligence have served it overages. As compared to most other areas of Islamic learning, the Islamic fiqh occupies much greater importance. Its chief characteristic in which no branch of knowledge could stand equal to it is its vivacity and fuller ability to be applied to ever-changing situations and conditions of life. The same characteristic accounts for the spectacular life of this branch of Islamic learning as a living subject of academic study. Islamic fiqh, or, to use a more current academic title, the law of Islam is by no way a subject of study limited to the narrow confines of so-called research and hair-splitting, it possesses the reins of guidance and has a critical eye on the ever-changing situations of time. It controls the system of morality of the human beings; it plays a much greater role in conditioning the human society. Should it loses its grip from over the Muslim society, there will be no difference between the human beings and animals. It is the law of Islam which not just discusses the private sphere of the human existence, it concerns itself with the formation of human society and political system as well. In fact, the law of Islam is a very magnificent Divine gift to humanity and no positive and man-made system of law could stand equal to it. History bears testimony to the fact that so long as the world remained under the reins and guidance of the law of Islam the world remained the cradle of peace, tranquility, welfare and prosperity. But when the world deprived itself from the blessed shade of the law of Islam, poverty, insecurity, terrorism, immorality, hunger turned out the order of the day. Love, toleration and human values turned extinct; and whole the moral philosophy became confined to the books, with no relation to the general human conduct. The law turned out a plaything in the hands of powerful ignorant sections of the human society. The people not gifted even with the sufficient amount of intelligence did not hesitate to make the law the subject of their study. Worse still, such people had no solicitude towards the law or the human beings; the only qualification qualification they had was the electoral mandate. This way the law was made a tool to satisfy the base desires and to promote animalisms. Once the world deprived itself from the guidance of the Islamic law, the life lost its charm.

In order to reconstruct itself and regain its charm the world needs again the guidance of the law of Islam. The peace, in search of which the directionless humanity has long been groping in the dark, could once again be secured under the aegis of the law of Islam. As compared with the law of Islam of Divine origin, all the man-made legal systems stand dwarf and incomplete, their benefiting from the law of Islam notwithstanding, and in spite of the fact that the positive legal systems are being served by best and intelligent minds of the world, they still are trailing in their infancy.

Today the serene people of the world seriously wish to think about the Islamic law and its applicability. But, unfortunately, partly due to our simplicity and largely due to the cunningness of others the matter has not crossed yet the stage of thinking and forming ideology and no practical step has been taken. Under such circumstances our men of outstanding Islamic scholarship stay obliged to work on the Islamic law. For the past few decades many people, both in the sub continent and outside, have taken up the task and many academic efforts have come into light. Still, no great work has yet appeared and no preparation in this direction is being seen. It is perhaps due to the fact that this academic work is less promising in monetary terms and the input apparently outweighs the output. To undertake such an arduous task the slothful dispositions can hardly prepare themselves. For the people in general tend to secure material benefits and progress without much labour. More alarming is the spectacle that most people are not prepared even to spare time to study the books which have so far appeared on the law of Islam.

From among the works that have been undertaken by the Ulama of the present age the one authored by Maulana Mufti Akhtar Imam Adil Qasmi, Ex Professor in Hadith and Chairman Sharih College Darul Uloom Sabilus-Salam, Hyderabad (India) and standing rector Jamia Rabbani, Manorwa Sharif (Samastipur, Bihar) is comparatively more useful, scholarly and comprehensive. As far as I know, Muft Sb's book is the most compendious work on the law of Islam appearing in the present century. Indeed this is a magnificent academic gift of the age. Its contents, among other things, include history of the development of the law of Islam, its ideological foundations, its sprit, nature and temperament, its principles and normative bases, distinctive features, refutation of the commoner misgivings, misunderstandings and allegations, mention of most of the works on the Islamic law, introduction to the famous positive legal systems in force in the present world, a comprehensive list of the books on the Islamic law and jurisprudence, explanation on the essential juristic terms, etc. In view of a wider variety of its contents some legists have called it an encyclopedic work on the subject. It combined a range of contents which could hardly be found in a single book. In the Arabic language there have appeared dozens of important works on the theme, yet there is hardly a single book which treats all the themes touched upon by the book under review. In deference to the recommendations of a number of the noted men of Islamic learning the English version of this comprehensive work is being published.

(Reviewed by quarterly Dawate-Haq, Manorwa Sharif, Bihar).

Moulan Md.Asrarul Haq Qasmi (M. P)
Founder All India Talimi Wa Milli Foundation

Respected brother!

As-Salam alaikum wa ramatullahi wa brakatuhu.

May you find the letter in a state of good health and prosperity. I'm in receipt of your letter dated October 17 accompanied with the priceless academic present a set of Qawanine-alam mei Islami Qanun ka Imtiyaz. For this kind gesture I'm grateful beyond expression praying Allah for your all-round prosperity.

Today humanity stands helpless and wretched. It has long been looking for those who are truly solicitous for it and deeply concerned about its well-being and prosperity; those who might heal its wounds and reconstruct the present wretched human society on the foundations of deep faith, conviction, true knowledge of Allah, justice and equality, right belief, higher moral standards and purity of conscience and spirit.

The task of reconstructing humanity assumes even greater importance when we see the world is standing on the precipice of total destruction amidst the heaps of the atomic arsenal, and the weapons of mass destruction in a situation when the imperialistic aspirations of greater powers are on the rise. As reaction, the majority of human beings is seething with extreme anger, enmity and detest. The extremism and headstrongness of greater powers is getting more dangerous proportions day by day. It is feared that the present-persistence on pure material outlook and materialistic attitude towards life and world might lead humanity to world-wide destruction. In order to avert the imminent fall of humanity what is immediately needed is to make efforts to reconstruct it along the lines of true spiritual values. This task has to be carried out with peaceful and wise approach.

On this critical turn of human history, when it is marching headlong towards its total destruction, it is never the man-made secular laws which are able to infuse life into its wretched body; it is only the law of Islam which may bestow new life on the wretched humanity. Man-made laws deal only with the apparent acts; the law of Allah, by contrast, do change the inner world. So because it is the only law which is fully consistent with the human nature. It not just refrains man from falling into evil; it creates hate against evil in the hearts. Faced with this critical state of affairs, the human race stands obliged to choose either one option from the two : either to continue in its present fashion of living and persist on its hedonistic cult and eventually fall into the mouth of death and destruction; or to apply its thinking power and perceptive faculty to wrest itself from the materialistic lunacy and reconstruct the society on the foundations of noble spiritual and higher moral values of life and its system of law, the only one in perfect conformity with human nature. The world of un-Islam has no moral and legal asset for the constructive use of humanity. It is the teachings and the law of Islam only which possess a fuller competence and ability to deliver humanity from its present destructive competition, directionless struggle and the dangers of imminent destruction. Present alarming situation of the human society demands that humanity must be enlightened with the natural truth that it is only the Divine law of Islam which possesses a fuller ability and competence to solve the complicated and outstanding problems of human society like freedom of belief, good behaviour towards the whole human society, international relations, the natural place of woman and her responsibilities in the construction of the human society, respect and dignity of human life, social justice and all other ideological and practical issues. History bears testimony to the effect that no other law has practically solved those important propositions than the Divine law of Islam.

Praise to Allah taala, you have offered a timely guidance to the wretched and agonizing humanity by this prestigious book through a just, scholarly and objective way of thinking, couched in an easy, heart-touching, academic style. This is a Divine grace, He gives to whom He wishes.

Sincerely yours,

Post Box : 9224, Foundation House, 236-Opp. Street No. 18, Zakir Nagar, Okhla, New Delhi-110025 (India), Tel: 011-65675966 Telefax: 26984730; E-mail: asrarulhaqqasmi@yahoo.co.uk

Maulana Khalid Saifullah Rahmani , Secretary General,Islamic Fiqah Accademy Delhi,India.

Present sojourn of human life, as clearly expressed by the Qur'an itself, in fact is a period of test and trial. And, in order to put the man to test Allah ta'ala has placed in his heart a never- quenching thirst to satisfy his never-ending wishes and cravings. Man has been endowed with various abilities and every ability has its wants and manifestations: his eyes, his ears, his tongue, his stomach, his body, his sense of aesthetism, comfort-seeking and egoism all are the things which have their own specific demands and requirements. On the other hand, the Creator has placed countless reasons of attractions in the world around him. The scientist fraternity has discovered gravitational force in the earth. This fact apart, every part and particle of the earth and all natural phenomena have a lot to attract both the heart and sight of man: high peaks of mountains wearing the glowing white icy sheets, the vast bluish oceans and their rolling currents, larger deserts, colorful, odorous spring of flowers, wide variety of fruits, and, to top it all, the marvels of human doings- all are the things which do attract the human ambitions to it. The boiling volcano of passionate yearnings and an extremely attractive nature of the world around him brings into collision and conflict the different sections of human society. Quite naturally, if there are more seekers than one of a single object, the competition and conflict is inevitably natural. To ward off this possible conflict the human beings need such a balanced code of life as determines the rights and duties of people in such a way as to make them their life without resorting to conflict and destructive competition, enabling the differing sections of human society to satisfy their needs without harming others. Everyone needs eating but without forcing others to suffer hunger; they need to wear clothing, but never at the cost of other people's clothing. Every individual of human society needs security, peace and comfort, but, again, never at the expense of other's security and peace. Freedom is the most primary need of all human beings, but no section of human society has the right to endanger others liberty and freedom. The system which regulates different departments of human life and determines the rights and duties of human beings in the structure of the human society is termed law. Through the agency of law the human society is made civilized, cultured and mannered. The same thing accounts for the fact that throughout the human history no civilized nation in the world has ever been found without a legal system to regulate its affairs of life. Those laws have been of two types: either

Divine, based on the Why revealed from Allah, the Master and Creator of the whole universe, to His chosen men called Rasuls, Nabi, Prophets and Apostles in the religious terminology. Or, the positive, and the man-made ones. To regulate the human affairs in a natural and balanced way it is the Divine law which has been proved fittest by the experience of ages. For the proper efficiency of the Divine law vis-a-vis the regulating of the human affairs the only condition being the pristine and pure and unadulterated by human tempering. The fact that the Divine law only is in complete conformity with the human nature is self-evident for it is the creation of Allah ta'ala and is there anyone who could claim to have a better knowledge of the human nature than Him? In sharp contrast, man, in spite of his all pretensions to knowledge and scientific advancement, is of shorter knowledge, experience and research. Every one knows the historic truth that the thoughts, claims and researches of the scholars of the past, who were acclaimed, accredited and acknowledged by the succeeding ages, could not stand the test of modern scientific research and factual analysis and the mountains of knowledge, research and scholarship, held in high esteem by people, proved only a cloud of dust. Man is not fully aware even of his own being, let alone the world vast around him. As regards justice and equality, there is hardly an individual in the whole of the human race who can safely claim to be always above the sectional, political or other types of affiliations. That is why no human society has ever been found without ideological, linguistic, racial or geographical prejudices and the ruling elite has always been subjecting the ruled to their injustices and wrong. The weaker and poor sections of human society have over ages been exploited by the powerful wealthy sections. Allah is all-knowing and nothing escapes His all-including knowledge. He has created man and the world around him and only He knows what is better for him. Who is more aware of man's benefit and norm than Allah, the Creator, the Law –giver? No sections of human beings is closer to Him than the rest. All are His creatures and as such nobody enjoys superiority over others, and His, revealed law can not afford to favour one or more sections of humankind to the exclusion of others. In short, the source of the law of Islam is He alone, and hence it is the law of Islam which ensures security, justice, equality and peace for all. Perhaps that is why justice and knowledge have repeatedly been mentioned by he Qur'an as outstanding attributes of Allah.

The history of the Divine law dates back to Adam, the first man and the father of mankind. Then followed a long chain of the messengers and prophets of Allah. Other reasons apart, there were two main reasons which accounted for the initiation of this long chain of the Prophets and Messengers. First, to purge the Divine law of human corruptions and adultrations. Second, to guide and direct the gradually-growing and maturing human society in changed social conditions and granting humanity new alternate directions and commands to suit the changed cultural and civilizational set of conditions. No sooner the human society reached its pinnacle in terms of social maturity, Muhammadur-Rasullullah, the Final Messenger and Prophet of Allah to all mankind, was sent with the Final, complete and perfect edition of the Divine law and with his advent the chain of the prophethood and messengership did come to its end. The relationship between the edition of the Divine law brought by Muhammad, the Final Messenger and those revealed to the prophets that preceded him is that between the clothes of childhood and youth, fully developed and grown up body of man. During the years of his physical development in the span of weeks, months and years the clothes fall short and he repeatedly needs to have changed clothes measured upto his growing stature. But once he reaches the age of youth, the clothing prepared will never turn insufficient to cover his body till the last moment of his life. The law, or the Shariat, revealed to the Final Prophet of Allah, is the clothing of youth and fully grown up man, hence immune to the old age and anachronism. Simultaneously, it will always remain safe and secure against all types of human corruption and adultration. To say the truth, no revealed law could claim to have retained its originalilty and purity till date other than the law of Islam and the Shariat brought by the Prophet Muhammad (PBUH).

The law of Islam is primarily based on the book of Allah. Then it is the words and practices of the Prophet of Islam which offer an authentic explanation to it. Then the *fatwas* and answers furnished to the people's quarries by his august and highly-placed fellows explain his words and practices. Put together, these three items constitute the fundamental sources of the law of Islam. The Qur'an and hadith contain both normative principles and the particulars of practical commands and directions. The problems and issues not clearly touched by the Qur'an or hadith have been dealt with and explained by the jurists and men of exceptional scholarship. They derive their answer through applying the standard principles of inference and interpretation. If a point of interpretation is consensually agreed upon among all the jurists, this state of consensus is termed Ijma. In case there is a difference of opinions amongst the scholars based on different types of similarities, it is termed Qayas. The Qayas, again, might go into kinds and degrees which have been called *istihsan* (juristic preference) *masalih-e-mursalah, sadd-e-zariah, istishab,* etc. The Divine laws preceding the law revealed to the Final Messenger, in some situations, may also constitute a source of law, subject to the corroboration of the Qur'an and sunnah. Thorough the extensive and careful use of the possible sources the Fuqaha and the jurists of Islam have developed a complete code of life which covers all spheres of human life. This developed corpus of law of Islam now is called the Fiqh-e-Islami and the law of Islam.

Keeping in view its comprehensiveness, beneficence, consistence with the human nature, its conformity with the demands of reason and observation, fuller competence and ability to guide humanity in changed situations and its well balancedness has no parallel and is matchlessly unique. Our this expression is not mere a religious dogmatism; it is rather a factual reality which has duly been acknowledged even by eminent scholars from outside the fold of Islam. That is why it has successfully ruled the larger parts of Asian, African and European subcontinents for over one thousand years. European scholars have acknowledged the fact that in the legal studies there is a number of branches which have exclusively been found and introduced by Muslims like principles of law and jurisprudence, the laws governing international relations, to name only two of them here. But, strangely enough, the western temperament, generally speaking, has aversion to Islam, its teachings, and its legal system; its attitude towards Islam is that of an unjust and blind critic.

With the perspective of things as given above, it was a long- standing need that a man of exceptional knowledge of Fiqh and the Islamic scholarship undertake the writing of a comprehensive book to introduce the law of Islam to the world in its pristine form, expressing its outstanding features and distinctions, history of its compilation and age-wise development, listing the important relevant book and refuting the misgivings and allegations generally found in modern mind. The book under review is a successful initiative in this direction. The body of this two-volume valuable book consists in five sections, according to the following short description:

Section I presents a detailed introduction to the Islamic Fiqh.

Section II seeks to dispel the doubts about Islamic Fiqh and law.

Section III introduces some famous secular constitutions and legal systems practically in force in a number of great countries of the world and draws a comparison of the Islamic law with these secular ones.

Section IV briefly mentions a number of important Fiqhi books. This is in order to give the sholars and readers an easy access to the vast corpus of the Islamic Fiqh.

Section V offers a comprehensive glossary of Islamic and Fiqhi terms. Thus, in the Urdu language a two-volume excellent work on the Islamic Fiqh has appeared.

As regards the author of the book, he is Maulana Mufti Akhtar Imam Adil Qasmi, a bright star of a great religious and academic household of Bihar. Having earned his graduation and Ifta degree from Darul Uloom Deoband, he had the opportunity to teach the advanced books of Fiqh and other branches of Islamic scholarship of different seats of Islamic learning. During the first decade of the 21st century he took a courageous step by establishing Jamia Rabbani at Manorwa. Since then the Jamia is steadily advancing. He has authored a number of valuable books and holds an eminent position in the circles of Islamic scholarship. In the seminar of the Delhi-based Islamic Fiqh Academy of India his writings and contributions are greatly appreciated. His present book holds special position and satisfactorily deals with an important area. May Allah ta'ala bestow acceptance on this book and the author's academic voyage receive more and more success and realize further achievements.

(Khalid Saifullah Rahmani a servant of al-Mahadul Ali Al Islami
Hyderabad(India) and Islamic Fiqh Academy, India
17 Safar, 1431/February 3, 2010)

Maolana Sayyed Md. Rabe Al Hasani Al Nadwi
Nazim Darul uloom Nadwatul Ulama Lucknow U.P President All India Muslim Personal Law Board

Respected Maulana Akhtar Imam Adil Sb.

As alamualaikum wa rahmatul allahi wa barakatuhu,

I hope you are receiving my letter of acknowledgement in a state of health and prosperity. I'm in receipt of your gift of knowledge which has of course appeared in the form of a satisfying scholarly work on the Islamic Fiqh and its comparison with other legal systems in force in the contemporary world. I was already aware of your academic endeavours and painstaking engagements for the sake of the knowledge of Islam and the Islamic Fiqh. Although no face to face meeting with you is fresh in any mind, yet in the background of your academic endeavors the meeting is always fresh. Through the medium of your present book of high value I came to know of your excellent knowledge of Fiqh. I appreciate your present work greatly and see in it a special aid for those particularly associated with the area of Islamic law and the Fiqh-e-Islami. Since my health is no longer proper, I could'nt spare time to systematically study your valuable book; I have cast only a cursory look at it.

May Allah turn this book more and more useful and place it in His good acceptance.

(Md. Rabi Hasani)
3.12.2008.

A COMPENDIUM OF ISLAMIC FIQH.

(Maulana Ghulam Muhammad Wastanawi Rector Jamia Islamia Isha'atul Uloom, Akkalkuwa, Maharashtra)

Praising Allah and invoking His blessings and peace on His Prophet.

This world, as stated by Allah in His Book, The Qur'an, is intended to be a place of trial and test. As test paper, He has addressed mankind with types of rights, namely, the rights of Allah, and the rights of the other men. As rights both the categories are equally important. The rights of creatures have a degree of importance over the rights of Allah as they are more binding. The rights of Allah, by contrast, enjoy a degree over the former type of rights from the viewpoint that they are greater and more respectful from the rights of creatures. If both the types of rights are compared with other concepts of rights than that of Islam, the difference between the two will of course be as wide as between the light and darkness.

In his present valuable book Maulana Akhtar Imam Adil Qasmi has successfully tried to uncover this fact. The book bearing the name of Qawanin-e-Alam mein Islamic Qanun Ka Imtiyaz exists in two volumes and a number of the great men of Islamic learning and scholarship have appreciated it, as is evident from their opinions and reviews.

Much as my heavy mental and physical engagements, I had the opportunity to study the book from different places. According to my assessment the book comprises lengthy and satisfying discussions of important points of Islamic Fiqh and jurisprudence and the book is a very successful and compendious attempt. The body of the book consists in five section: (1) Introduction to Islamic law and its distinctive features; (2) Dispelling the doubts and misgivings about Islam; (3) Shorter introduction to important secular laws of the contemporary world; (4) Primary source books on the law of Islam; and (5) Glossary of general and Islamic juristic terms. The last section is intended to be a guide to further study of the law of Islam and Islamic literature. The opinions and reviews, some of which exist in the book, include of Maulana Sayyid Asad Madani, of Maulana S. Anzar Shah Kashmiri, Maulana Md. Salim Qasmi, Maulana S. Nizamuddin, Maulana Nimatullah Azami, to name only a few. The reviews and the opinions of those great Ulama speak well of the book's importance and usefulness. May Allah turn this book useful for those associated with the Fiqh, and an asset of pride for the author's parents, his teachers and his relativs and, above all, place it in His good acceptance.

(28 June, 2009, corresponding to Rajab 3, 1430.)

Dr. Md. Manzur Alam,Chairman, Institute of Objective Islamic Studies, New Delhi-25

Venerable Maulana Akhtar Imam Adil
Rector Jamia Rabbani, Manorwa, Samastipur, Bihar.

In the Name of Allah, the Merciful, the Compassionate

Venerable Maulana!

As-salamalaikum wa Rahmatullahi wa Barakatuhu

May you receive this letter in a state of perfect health and prosperity.

I received with great pleasure your letter accompanied with a valuable, beautiful and appreciable gift of knowledge. May Allah reward you in a better way. For some time I had been out of country. On my reaching office today I had the opportunity to see your letter and the gift. It gave me immense pleasure. For the love, sincerity and kindness you have shown to me by honouring me with this precious gift. I'm deeply grateful. I wll benefit from your valuable book and then will talk to you further. Towards the end of this receipt I pray Allah Ta'ala to honor your book with acceptance and on us bestow taufeeq to benefit from it more and more.

We are in good and peaceful conditions.

Greater Islamic Historian Maulana AzizulHasanSiddiqui Mohtamim Madrasa Dinia Ghazipur U.P. 233 001

Venerable Maulana Akhtar Imam Adil Sb.

May Allah enhance your beneficence

Wa alaikum as Salam wa Rahmatullahi wa barakutuhu

We are in receipt of your Qaqanine Alam mai islamic Qanun Ka Imtiyaz. It gave immense pleasure both to our heart and eyes. This is indeed a great work which you have been able to undertake by special taufeeq from Allah ta'ala. The book is so comprehensive as resembles an encyclopedia; the magnitude of this book and its varied contents required the painstaking labour of a group of scholars but you alone undertook this onerous task I offer the best congratulations to you. I'm even more pleased at the feeling that so important a work on the law of Islam has been carried out by a scholar who has benefited from our Madrasa Dinia in the earlier phase of his studies.

This book is so great and important as to attract a degree of doctorate in the legal studies. But unfortunately in our country there seldom exists such a tradition. A couple of years ago we established Maulana Hashmi Foundation. This foundation bestows awards on the scholars and researches for their outstanding works of research. The Award Committee of the Foundation is soon to hold its meeting and I hope the award for the year 2009 will be given to you. The date will be notified soon. We are sanguine that you will attend the Foundation's Award Ceremony and accept the award.

(6.12.2008)

Opinion of Dr. Saeedul Azami Nadwi Editor-in-Chief Arabic monthly al Basil- Islami, Darul-Uloom, Nadwatul Ulama Lucknow.

Dear Hazrat Maulana Akhtar Imam Adil Sb.
Founder and Rector Jamia Rabbani, Samastipur, Bihar
As-salamualaikum wa Rahmatullahi wa Barakatuhu.

Your esteemed letter, alongwith the response envelop and other relevant papers and credentials, gave me immense pleasure. Your blessed book, *Qawanine-Alam mai Islam Qanun Ka Imtiyaz*, while is a rare gift to the scholars of the Islamic Law, it speaks of your deep knowledge of the Islamic Shariat as well. I think this valuable book should appear in the Arabic, English, Hindi languages as well. It is indeed a valuable addition to the existing vast corpus of the Islamic law.

May Allah *ta'ala* place your this academic endeavour in His good acceptance, and turn it a source of benefit for the general Muslim community, making it a sound base for further academic works in the Islamic institutions and universities to uncover the newer aspects of the Islamic Shariat.

Al-Basil-Islami will make mention of this valuable book on its pages on a suitable occasion. The amended letter of credence is being sent to you. You are requested not to forget me in your good prayers. Salam masnun is being offered to all.

My you receive this correspondence in better condition of your health and peace of mind.

Yours sincerely
Saeed al-Azami
7.6.1430 2/6/2009

Hazrat Maulana Sayyed As'ad Madani Formerly Amirul Hind and ex-President Jamiat Ulama-e-Hind

In the name of Allah
Venerable Maulana Mufti Akhtar Imam Adil!
Salam masnoon!

Thank you very much for remembering me. I am in receipt of the books you have sent. Upon seeing the books from different places my assessment is that you have spared no effort to make them useful to the maximum possible extent. May Allah accept your labour and grant *taufiq* for further religious and academic works.

The vast academic topic you have chosen to be the subject matter of your fresh academic attempt *'Qawanin-e-Alam men Islami Qanun ka Imtiyaz'* is of course a good selection and the best choice. The need to deal with the subject of this type in our contemporary age in no longer a hidden fact. Your other books too are very important in so far as their subject matter. In the western countries the people think, and often curious to know, what rules have been prescribed for creating relations with the non-Muslims and the rules of conduct with them and what is the concept of Islam towards the human rights. Even a greater part of Muslims is unaware of such things. In your books you have thankfully tried to meet such questions. It is hoped that your these academic endeavors will prompt and encourage other men of Islamic scholarship to work round this important topic and thus a lamp will lit more lamps. And the efforts of the Muslim scholars to this effect will counter the propaganda being carried out by the anti Islam forces against the merciful teachings of Islam.

For Allah it is not a thing difficult

Allah is prayed to embolden your courage and determination and grant you further better opportunities to undertake more and more services for the support of religion and knowledge.

(**As'ad Madani ,**Madani Manzil, Deoband)

Reviews and Opinions of the great and noted men of Islamic scholarship on the original Urdu book *Qawanin-e-Alam me Islami Qanun ka Imtiyaz*

Amir-e-Shariat Haz Maulana Sayyed Nizamuddin Sb. Secretary General, All India Muslim Personal Law Board

In the name of Allah, the Benevolent, the Merciful

The Law of Islam is the creation of Allah which He, out of His wisdom and high expediency, has created along the natural foundations of human psyche. By following only His law man can fulfill the ends and objectives of his life. In sharp contrast to the law of Islam, the positive legal systems are primarily based on the national and temporal expediencies. The change and development in human thinking is naturally bound to bring change to the human law. The same fact reflects in the laws of some of very 'civilized' nations of the contemporary world, where laws are mainly enacted to meet unexpected expediencies. And those laws lose all their import and significance as soon as those exigencies are over. The most distinguishing merit of the law of Islam is that it is not subject to the society, rather it is the society which is the subject to the law. Unfortunately, for decades the forces hostile to Islam and Muslims have been making sustained efforts to tarnish the face of the Islamic law and defame its teachings in order to sunder the relationship of Muslims with the Holy Prophet and thus make them intellectually surrender to un-Islamic legal thoughts. This conspiracy was timely noticed by our predecessor Ulama and the men of Islamic scholarship, and with a view to counter it, they wrote numerous important books and treatises. In this book our learned author, Maulana Akhtar Imam Adil, has conducted a thorough study of the Islamic law to meet the needs of the new age and keeping in view the modern educated mindset and intellectual class of people. The learned author is well-versed in the Islamic Fiqh. As an active discussant, his participation in the seminars of the Islamic Fiqh Academy of India renewed his taste for research and study in the limitless realm of Islmic Fiqh, and he prepared a number of articles to deal with different aspects of the Islamic Fiqh. These characteristics have rendered the book even more useful and informative.

Having a cursory look at its table of contents, I felt the book was a comprehensive and authentic work. Allah is asked to render it even more useful both for the men of Islamic scholarship and the masses.

Hazrat Maulana Md. Salim al-Qasmi.

Recter Darul Uloom Deoband (Waqf), and
Vice President, All India Muslim Personal Law Board.

Praise to Allah, the only Being deserving to it, and blessings and peace on His Prophet Muhammad.

The first and primary source of the Law of Islam is the book of Allah, and the second source is the Sunnah of the Messenger of Allah. While Glorious Qur'an is the legal text, the Sunnah is an authentic explanation of it. Then, the Sunnah assumes the position of body for Fiqh and the Fiqh turns out an inferred exposition of it. Going by this natural order, even the minute inferred details fall under the general principles of the law laid down by the Qur'an and Sunnah. The same has become the final criterion to judge the validity or falsity of all the things inferred from the general normative principles of the Shariat of Islam.

The Islamic law is the only law which encompasses all aspects of human life. In the past all other legal systems stood for nothing except the royal decrees and the commands of the monarch, which, far from being just, satisfactory and convincing, had often been against the dictates of the human reason. Worse still, any question about the reasonability and rationale of those so-called royal laws or showing an attitude of disobedience towards those laws had been bound to bring the tragic end, or the severest punishments to the subjects. It is undeniably the law of Islam the justness, balance and systematic reasoning of which opened the eyes of the nations of the world. This unique character of the Islamic law made Islam not just to substantially influence the world in a span of time shorter than the half of the century, it gave birth to a new genre in the field of legislation, and treading upon the footsteps of Islam the activity of reasoned legislation took its beginning. In other words, it is Islam from which the world learnt the correct way of legislation.

The book in hand *'Qawanin-e-Alam me Islami Qanun Ka Imtiyaz'*, authored by our respected Maulana Mufti Akhtar Imam Adil, in which he has so sensibly treated the Islamic law, not just testifies to his great knowledge and erudition, it clears numerous aspects of the law in a unique way based on a first hand knowledge and experience of the modern psyche as well.

This unique feature of the book is legitimately expected to give a wide-spread acceptance and popularity to the book and, simultaneously, will successfully counter the spiteful, unjust and prejudiced campaign against the law of Islam launched by narrow-minded and bigot orientlists and their eastern disciples.

Allah *ta'ala* is asked to bestow the general acceptance on the book, making it a means to elevate the word of Islam and establish the uniqueness of the law of Islam, and a source of great reward in the Hereafter for the author.

May Allah *ta'ala* reward the author best both herein and in the Hereafter.

(Md. Salim Qasmi)
Mohtamim Darul Uloom (Waqf) Deoband
Wednesday, March 2, 2005

Opinion of the grand teacher Haz. Maulana Sayyed Anzar Shah Kashmiri

Ex-Shaikul Hadith and head faculty,
Darul Uloom (Waqf), Deoband.

The learned dear Maulana Akhtar Imam Adil is not alien to me; he has been contributing, by his immense learning and erudition, to various academic magazines and periodicals. May Allah *ta'ala* take him to further heights and prosperity.

Present book comprises valuable discussions and thus meets a very important need of the hour. The need to work on this front has become even more obvious because facts have unfortunately lost into fictions and the fictions are being treated as facts.

Our contemporary age is of the Devilish propaganda; within its range not just are the Muslims, but Islam, its clean, humane teachings, and the law of Islam as well. To defame the religion of Islam and its invigorating teachings newer techniques are being employed at the expense of the bigger monitary amounts. Under such dismal state of affairs it is undoubtedly an urgent need of the time to give a better exposition to Islam and its teachings based on the concept of absolute peace and construction.

The learned author's present book is an initiative in this regard. His painstaking labour is valuable and inspiring for the new generation. In the Arab world many a scholarly books have appeared on the theme, and a number of ancient manuscripts has also been edited and published. The Urdu language, however, has not yet been so fortunate to have such valuable books. Fewer attempts, mostly incomplete, have been made. Present work is comprehensive and discerning. May Allah make the book useful and acceptable to the circles of Islamic scholarship.

(**Anzar Shah Kashmiri)**
20,Moharram ul Haram 1426,2 March 2006

‘An Encyclopedic work’
Opinion of the great Muhaddith Haz. Maulana Mufti Saeed Ahmad Palanpuri

Shaikhul Hadith & Chief Of the Faculty Darul Uloom, Deoband)

We praise Allah and invoke His blessings on His Noble Messenger.

In the name of Allah, the Benevolent, the Merciful

Maulana Mufti Akhtar Imam Abil’s proudable work *‘Qawanin-e-Alam me Islamic Qanun ka Imtiyaz’* is now before me. The challenges to Islamic law and the Islamic culture are no longer a secret for the people of Islamic insight. To counter this mischief we are required to make great preparations. Comparative study of the law of Islam and other legal systems of the world constitutes a very essential requirement of the advanced students of Islamic Law and the *fatwa*. There was an acute dearth of the sources in this regard. The Arabic language possesses a great wealth in this regard. But, as far as the Urdu is concerned, there exists very little material to serve the purpose. This book, the *magnum opus* of the author, is rightly expected to fill the vacuum the Urdu readership of the Islamic studies has long been feeling. This valuable work consists of five sections according to the following order:

Section-I : The main items of this section are:

Introduction to the Islamic law, characteristics and distinctive features, gradual development, various ages of its development, their chief traits. It also sheds light on the works’ on *Fiqh* carried out by the Muslim scholars during the long past and the present of the Islamic Fiqh. This section also touches upon the international law of Islam.

Section-II: This section seeks to refute the misunder-standings and mistaken views generally found in the non-Muslim intellectual class. For this purpose both old and new sources have been drawn upon. In this context examples of influence of the Islamic law on the man-made laws have extensively been cited.

Section-III: This section is intended to be an introduction of some famous man-made laws in force in well-known countries of the contemporary world, with special focus on their grave shortcomings as compared with the perfect law of Islam.

Section–IV: This section mentions the source books written on the law of Islam. Almost 2500 juristic references have been mentioned under this section.

Section–V: This section contains a wealth of juristic terms which a scholar needs while studying the world's legal systems. Almost one thousand terms have been mentioned and explained in this section.

This way the book has assumed the status of an encyclopedia . Although it might seem rather unfair to claim it to be the final thing on the theme, it's nonetheless a work more comprehensive and detailed ever written on the genre.

May Allah accept this work, widen the circle of its beneficiaries, turn it a means of reform and prosperity and take the learned author to higher grades of success and felicity

(Saeed Ahmad)
Safar 13, 1426 Hijri.

Valuable opinion of Maulana Dr. Abdullah Abbas Nadwi

Formerly Professor at Jamia Ummul Qur'a,
The Holy City of Makkah,
Ex-Secretary of Education, Darul Uloom Nadwatul Ulama,
Lucknow.

Praise to Allah, the Cherisher of all the worlds. And blessings and peace on Muhammad, the Leader of all the Messengers, on his progeny and his Companions all.

As far as the Islamic Fiqh is concerned, it has, ever since the beginning of the Islamic history, been the favorite work field of our foregoing Ulama and the men of high scholarship, and numerous valuable and epoch – making books have come into being by their sincere, painstaking efforts and the work is still on with great vigor and diligence, and the experienced Ulama of our age possessing great insights in Fiqh, jurisprudence and *fatwa* are rendering great service to Islamic Fiqh. The endeavours of these sincere Ulama shall occupy the same position in future as is engaged today by the Turkish al-Majallah, Fatawa Alamgiri, Fatawa Qazi Khan, etc which are regarded unquestionable authority and held in high esteem. The Chief characteristic of the legal corpus prepared by Muslims is that it entirely rests on the Book of Allah (the Qur'an) and the Sunnah of the Holy Prophet (peace and blessing of Allah be on him), that are immutable. All other laws undergo changes and alterations because of the fact that they lack stable sources. To illustrate the point, in the natural scheme of things the normative principles of the Islamic Legal system hold much the same position as do the four natural elements in physical structure of human beings. While the needs of the human physical structure change from time to time, the four basic elements remain unchanged. The same being the case of the Islamic normative sources of the legal system: the Book of Allah, the Sunnah of the Prophet, Consensus of Opinions and the Analogical Reasoning. All the emerging legal requirements of the human society of all ages could fully be met remaining within the boundaries of the mentioned four basic sources. No legislation carried out in disregard to the Book of Allah and the Sunnah of His Prophet would never be acceptable to the Muslim society. All other legal systems, including the Roman Law, have been subjected to innumerable changes and alterations.

The second characteristic of the sacred law of Islam being that it encompasses all aspects of human activities and all spheres of his existence, and, as such, has to be followed and abided by Muslims.

This encompassibility and mandatory nature of the Islamic Shariah brings the Ulama and the men of Islamic scholarship under obligation to continually serve it and to establish and maintain its leadership in the changing circumstances of the human society. This is the real purpose and *raison deter* of the great Fiqhi literature created by our Ulama. The voluminous works on Fiqh and Fatawa bear witness to this effect beyond doubt.

From among the valuable works produced during the last phase of the twentieth century the one on the Muslim personal law, undertaken by a team of the Ulama at the instance of the late Maulana Minnatullah Rahmani, founder & general secretary of the Muslim personal law board, deserves special mention. Then, the late Maulana Qazi Mujahid-al-Islam Qasmy upheld this tradition by establishing the Islamic Fiqh Academy of India and his periodical *Bahth-o-Nazar*. In other countries of the Islamic world new legislations, again in the framework of the four juristic sources, are being made to face the new questions born under the changed social situations and hitherto unknown issues brought about by the new scientific inventions, marvelous means of communication, new modes of business and commercial activities, banking, insurance, currency, monitary exchange, to mention only a few. And the work is in full swim. But the task is so vast and wide-ranging still requires more painstaking efforts and concentration. I am pleased to see the unpublished work of Maulana Mufti Akhatar Imam Adil. From among the books and works I had an opportunity to cast a look on them Mufti Akhtar Imam Adil's work is very important and valuable. Upon seeing the table of contents and the references from here and there, I got satisfied. His work is no less important than other works in the field and it fills a gap[1]. Although the book is still incomplete, yet it makes me have a good assessment of its thoughtfullness and academic painstaking. I hope the complete book will serve us in more ways than one. May Allah render the work useful for all and bestow His acceptance on it.

Abdullah Abbas Nadwi

---

[1] This opinion was expressed on his study of only the two first sections of the book Later, three more sections were added to the body of it.

PREFACE

By

Hazrat Maulana Mufti Md. Zafirud Din Miftahi

Great Mufti at the Darul Uloom Deoband

And

Maulana Allama Md. Nimatullah Azami

Great Muhaddith at Darul Uloom Deoband

Praise to Allah, the Sustainer of all the worlds, and peace and blessings on the Noblest of the Messengers, on his progeny and his Companions all.

The sixth century of the Christian era, it is generally agreed, represented the darkest phase in the history of mankind. Humanity had reached the edge of the precipice, towards which it had tragically been proceeding from centuries, and there appeared to be no agency or power in the world which could come to its rescue and save it from crashing into the abyss of destruction. Allah took mercy on humanity and sent His Final Prophet with His only approved religion, Islam, to guide mankind to the right path. The Prophet invited all human beings to the Book of Allah and his Sunnah. People heard from him the teachings of Islam and accepted them from the depth of their hearts. The Islamic teachings, on the strength of their intrinsic and innate value, pressed their way into the human societies bringing the greatest revolution to the human life. The Islamic Shari'at, or the law of Islam, has guidance for all aspects of human life. The man-made legal systems, contrariwise, suffer from serious damages. Devoid of the light of unabragated Divine Revelation, human law is nowhere as compared with the law of Allah. It is from Allah, Who alone knows all spheres and all aspects of human life. Only He is fully aware of man's inner tendencies and intellectual inclinations. Out of His grace and benevolence, Allah *Subhanahn wa ta'ala* blessed mankind with a religion so perfect and elaborate, fully consonant with the human nature, and fulfills all its innate demands. Islam is a religion which profoundly differs from all other religions ever found in the world. It is a religion and at the same time a highly balanced code of life that embraces – spiritual and material, moral and physical, emotional and intellectual, individual and social. It is the conflux of this world and the Next, the meeting point of the body and the mind and the spirit, where all the three unite to form a single reality, the basis of which is a real, living consciousness of Allah, the Creator and Master of the universe. But Islam does not stop there; it simultaneously shows us the way – the practical way – of reproducing this reality – the unity of idea and action – within the limits of our earthly sojourn, in our lives and our consciousness.

Belief in Islam as a Law decreed by Allah to be followed by humanity at all times and everywhere constitutes an article of Faith with the Muslims. It is an eternal plan of life that has been brought into the world by One, Who is not mere a law-giver, as have been many in the history of the world; he is the supreme and Final Messenger of Allah towards humanity, who always acted under Divine guidance and inspiration. Such being the case, those among the Muslims who, in emulation of the western prejudiced critics of Islam and Muslims, want to effect changes into its body of law and teachings in order to bring it, as they claim, into harmony with the spirit of the times, betray their own inner insolvency. A Law which, as a matter of reality, is the result of Divine Revelation, cannot be bound by the rules of organic life.

Mufti Akhtar Imam Adil's present book seeks to serve this everlasting law of Islam from a very useful angle – comparison between it and other laws of the world with a view to highlight its distinctive features as compared with the man-made laws. For this purpose he has cast a deeper look at the age-wise development of the Islamic legal system right from the first phase of the history of Islam till the recent attempts in this regard. In his attempt the learned author has been successful to establish and prove the superiority of different aspects of the law of Islam over all other man-made laws on the strength of the intelligible and well-reasoned arguments.

The contents of the learned author's present book might be subsumed in the following words:

'The law of Islam covers all activities of human life, exterior and interior, physical and spiritual. It is the only religion and law which ensures the safety of mankind both in ideas and actions, from misguidance, moral bankruptcy and bloodshed. Islamic law does not stand only for exhortation and admonitions, it embraces all departments of human existence. The man-made law, contrariwise, is, by its very nature, transitory, which can address the issues and problems of the present. It is only the Divine law which is equally useful for all human beings and transcends the limits of time' and age.

The book, in the same way, seeks to refute the allegations of the Western critics of the Islamic law. By making frequent references to the true Islamic teachings the author shows how it influenced the human mind and intellect and awakened them to the good of humanity at large.

In order to draw a sharp comparison between the law of Islam and other world legal systems the learned author head to undertake a thorough study of the man-made legal systems. Whatever the author has written on distinguishing features of the Islamic law is indeed eye-opener and its study by the scholars is recommended. Whatever he has written testifies to his great erudition and high intellectual capabilities.

The book centers round the Islamic Fiqh and the author has spent a long time for conducting a devoted study of the subject. In the brief historical sketch of the age-wise development of the Islamic Fiqh under the title, 'Juristic Activities in the contemporary Age', for example, the author has tried his best to shed light on all good and evil aspects. The comprehensiveness of this unique work gets established by, among other things, that it brings together a very useful material on the aspects of the compilation of the celebrated Fatawa Alamgiri. In this connection the author has provided minute details and mentions the majority of the books drawn upon in the preparation of this great academic monument of the Mughal Empire. He, in the same breath, makes mention of the well-know Turkish work on the law of Islam 'the *Majallah*' and the concerned facts and the legal import of it in the legal context of the Ottoman empire. The third part of the book makes mention of the famous systems of law of the contemporary world, the United States of America, France, Great Britain, to name some of them. The author's critical comments on various aspects of those laws deserve a careful study of the reader. The author has, then, established the balance, excellence and superlativeness of the laws of Islam. Those gifted with legal insights cannot deny the excellence and distinctive features of the Islamic Fiqh, the only condition is that they possess sound reason and proper understanding.

To sum up, the book in hand is the result of great labour and all-round study of the Islamic Fiqh and the history of its development. I would humbly like to advise the men of Islamic learning and researchers to study the book and invite others to read it with proper care.

Towards the end of this preface….. I can do nothing other than asking Allah *subhanahu wa ta'ala,* in all my earnestness, that He grant the author a blissful and successful life, and bestow a wider acceptance on his book and, above all, turn it a source of abundant rewards from Him in the everlasting life of the *Akhirat*. I hope this masterpiece of scholarship will be a memorable service on the part of us the Ullama as being the repayment of the due debt we owe to the Muslim Ummah.

Md. Zafirud Din Miftahi
Mufti Darul Uloom Deob

Maulana Nematullah Azmi Sahab
Teacher at Darul uloom Deoban

AUTHOR'S PREFACE TO THE URDU EDITION

Islam stands for a universal religion and perfect system of life. Ever since its advent Islam has been guiding humanity to the ultimate success. For a period exceeding one thousand years of human history it remained in possession of the reins of power and political leadership of a much larger and stronger part of the globe. In the course of this longer period, the religion of Islam withstood hundreds of revolutions and the changes of situations, and no group of people and the men of understanding ever felt, even for a single moment, that the law of Islam and the Islamic teachings suffer from narrowness, hardship or are incapable of keeping abreast of the developments of the human society. Far from turning obsolete, the law of Islam has been solving the problems of all classes of the human beings in all ages of the human history, playing a very substantial role in the development of both the community and nations.

So long as the Muslims remained consciously faithful to the law of Islam, development and prosperity of the Ummah continued without break. Wherever they went, they were accorded the heartiest welcome and warm reception. This was because of the fact that the *raison deter* of their going to anywhere was the introduction and establishment of the Divinely system of life which ensured peace, prosperity, development, stability and internal and external peace and tranquility for mankind.

Causes of Decadence

But when the Muslims, consciously or otherwise, grew indifferent to the teachings of Islam and their relation with Law of Islam weakened, they too began to lose their intrinsic force and degeneration set in their national and social life. For the social life always needs a collective system. Any breakage sustained by a social system is bound to break the social set up based on it. This is the point of fall of a nation irrespective of that the nation is conscious of it or not. The same turned out to be the fate of the Muslim Ummah. In the Divine System of law, which the Muslims had introduced to the world in the past, they held the position of the conquering nation. In the list of the priorities of the Islamic System of Law Muslims enjoyed greater part and other nations and minorities too were granted their full natural and human rights. Both the Muslims and other communities enjoyed fuller rights with the difference that in that system the Muslims were *giver* and all other nations the *receiver*. When the Islamic system was dethroned and replaced by the un-Islamic system, the society was sundered from the religious patronage. The things changed and sided with the secular system of law. The Muslims were the real losers; the forward ranks were captured by those who had no sympathy towards Islam and Muslims; so were left with no other option than to sit on the backseats.

Were the Muslims realize their loss and woke up their religious sensitivity and consciousness even after suffering so much loss, they would have redressed all their faults an rid themselves of the man-made forged systems. But senselessness of the Muslims' ruling elite, its culpable negligence towards considerations for the unreal contingencies killed its religious conscientiousness. The same dismal condition taking over a community has been termed as the national fall and collective death.

The major reason of the worldwide decadence of the Muslims and their social degeneration is nothing other than that they have grown disloyal to their faith and their link with their life-spring has weakened. They have turned indifferent to the Islamic system of life which not just secures the safety and security of their communal lfie and legitimate individual character but also in it lies the secret of the human existence and its an all round development. In the present structure of the material world the Muslims occupy the position of heart. It is the heart from which flows the blood to give life to the entire body. If the blood is sound and healthy, the entire body will grow healthy; on the other hand, if the blood is corrupt, the entire body will inevitably get corrupted. The same is true regarding the Muslims and the rest world. The corruption of the Muslim community has brought corruption to the rest of mankind. This corruption is being seen everywhere and we cannot say how long the world will have to experience this ideological and moral degeneration. For the *massiha* himself ill and the doctor himself is on the sick bed. Worse still, he is still unaware of the seriousness of his illness.

The same is the wish of the diabolical forces to make the self-conscious, Divinely duty-bound nation fall asleep so that the life spring may be dried up.

A broken-hearted’s wish

Were it that Muslims regain their lost glory and treasure by returning to their home; they get an eye able to differentiate between the pearl and concrete; to develop an understanding that the man-made laws could never be equal to the legal system granted by Allah, the Creator and Master of the World. How foolish, then, it is to ignore the law of Allah and submit to the secular laws of the world.

For a longer time the sincere servants of Allah have been doing their best to awaken the Muslims who for long have been in so deeper a sleep that repeated strokes too have proved ineffective to break the deep sleep of this nation.

Present book also is a modest attempt to the same effect. Seeing the enmity of the others towards the law of Islam and the Muslims' ruthless indifference to it, I have long been suffering a serious pain. The dismal spectacle of the Ummah has rent my heart apart. But my voice has no attraction nor I'm able to properly express my pain and restlessness. For a long time I have been titillating my injuries, expressing my inner pain in words. In short, my present book is the essence of my spiritual voyage, assiduous studies and observations extended over many years.

Brief Account of my Fiqhi Voyage

During the days of my formal studentship I was much interested in the logic, philosophy and scholasticism, and would take pleasure in tangling with the difficulties of those subjects of study. Kind patronage and encouraging guidance of my great teacher Haz. Maulana Ijaz Ahmad Azami was my torch-bearer in this regard. Much as I took equal interest in the study of the books on the Qur'an, hadith and the Islamic Fiqh, yet, to my assessment during those days, they were not so hard to require much labour. After the completion of my formal curriculum at the Darul Uloom Deoband, I was fortunate enough to get admission to the *Ifta* (roughly, higher studies in the Islamic jurisprudence), and I completed the *ifta* course under the care and guidance of the noted men of scholarship like Haz. Maulana Mufti Mahmood Hasan Gangohi, the Grand Mufti at Darul Uloom Deoband, the great scholar of his time Haz. Maulana Mufti Nizamud Din Azami, Haz. Maulana Mufti Md. Zafirud Din Miftahi, Haz. Maulana Mufti Habibur Rahman Khairabadi and Maulana Mufti Kafilur Rahman Nishat Usmani.

For the general principles and methodology of *ifta* I owe specially to Haz. Maulana Mufti Mahmood Hasan Gangohi and Haz. Maulana Mufti Nijamud Din Azami. As regards the details and the secondary rules and principles, I studied them at other teachers. The apprenticeship in the writing of *Fatwas* and practical training in the area I got under the guidance of Haz. Mufti Md. Zafirud Din Miftahi. As a result of my close association with the competent teachers at the *ifta* department my interest in Fiqh and *fatwa* got so much strengthened that I wished to devote two more years for further studies in the Fiqh and *Fatwa*. But my senior teachers made my selection for the assistant teachership in the Darul Uloom Deoband leaving no option of me except to submit to their decision. Upon my insistence of the pursuance of further studies in Fiqh Haz. Maulana Marjul Haz, ex faculty head, Darul Uloom Deoband, and Haz. Maulana Mufti Said Ahmad Palanpuri persnaded me into accepting their advice by saying; "specialization in the Fiqh is actually nothing other than practical engagement with it, it does not necessarily require the formal completion of the prescribed syllabus'. Moved by this exhortation and sincere advice, I bowed my head in submission.

An accidental event also spurred my Fiqi orientation. While I was assistant teacher in Darul Uloom Deoband I learnt that an international Fiqhi seminar was to take place in Delhi, the capital city of India, the heart and soul of which was Haz. Maulana Mujahidul Islam Qasmi, and great and noted scholars from all over the world were to participate in it. My venerable teacher Haz. Maulana Md. Zafirud Din Miftahi kindly granted me a piece of the seminar's questionnaire and asked me to write and answer it according to my study and research. The theme was 'position of Shari'ah on the currency notes'. The theme was completely alien, and I had no knowledge or idea about it. My study of jurisprudence and Fiqh was thus far limited mostly to the course books and the narrow and traditional confines of the Shami, Rasmul-Mufti, al-Ashbah wal-Nazair, Qawaidul Fiqh, Alamgri and Hidaya, and, to my disappointment, neither one of the said books discussed the problem of the 'currency note'. The questionnaire first time made me realize the fact how wast and difficult to explore was the world of the Islamic Fiqh. I prepared my first research paper on Fiqh and submitted it to the great teacher. He was very happy; he encouraged me and asked me to accompany him to participate in the seminar and I complied.

Before setting out on my journey to take part in the seminar I had already sent my paper at the address of the Academy. Upon reaching the seminar I was very much surprised to see an august assembly of the men of Islamic learning which had gathered there from all over the world in spite of the extreme cold weather of Delhi. In the same seminar I had the opportunity to see first time (the late) Qazi Mujahidul Islam Qasmi and Maulana Zafirud Din Miftahi introduced me to the Late Qazi Sb. and my paper strengthened this further. The sessions of the seminar moved my brain and heart in the extreme, brought a revolution to my juristic thoughts and opened new avenues of study and research in Fiqh. This surprising experience was not peculiar to me alone; most of the participants and discussants shared the same feelings and experience.

This historic seminar moved the direction of my study and research mostly to the Islamic Fiqh. My deep interest in the Fiqh and my research articles on different aspects of the Islamic Fiqh, published from time to time in the Fiqhi journals and periodicals prompted various institutions and seats of Islamic learning to invite me to participate in their Fiqhi programs. My active participation in those programs intensified my interest and study in the Fiqh. For this I'm greatly thankful to the Islamic Fiqh Academy and the Idaratul-Mabahithis Fiqhiya. May Allah protect them all.

During my stay in Hyderabad there appeared various causes and motives which offered me the opportunities to study the international laws and drawing a comparison between the Islamic law and other legal systems of the world. In this regard the fruits of my studies appeared in the academic quarterly the *Bahtho-Nazar*. My papers were greatly admired. This encouraged me and my study got published in the same important quarterly is sequel. The Late Qadhi Sb. was kind enough to publish them verbatim. Thereafter I further improved and detailed the items, and eventually, after undergoing many changes and improvements, the (Urdu) work is going to press. May Allah accept it and render it useful for the Ummah.

Besides pursuing my studies in the Islamic Fiqh, I had the opportunities to teach the subject. Some students and scholars have also been associated with me. During this period I felt that the students and scholars in the Islamic Fiqh, side by side their pursuance of the Islamic Fiqh, should also take interest in the study of the man-made legal systems so as to enable themselves realize the comprehensiveness of the Islamic law and know the superlativity, universality and applicableness of its principles and the normative fundamentals with a deeper convention. For this purpose a conscious student and scholar shall inevitably be required to have a good knowledge of the corresponding English terminology and the original source material of the Islamic Fiqh. Failing this knowledge, a student and scholar of the comparative law can hardly do justice to his subject. The scholars are also required to base their study on the original source books. Study based on indirect books often leads to misunderstandings and inaccurate results.

Organization of the material

The Original Urdu book consists of five sections according to the following description:

Section-I : The main items of this section are:

Introduction to the Islamic law, characteristics and distinctive features, gradual development, various ages of its development, their chief traits. It also sheds lights on the works' on fiqh carried out by the Muslim scholars during the long past and the present of the Islamic Fiqh. This section also touches upon the international law of Islam.

Section-II: This section seeks to refute the misunderstandings and mistaken views generally found in the non-Muslim intellectual class. For this purpose both old and new sources have been drawn upon. In this context examples of influence of the Islamic law on the man-made laws have extensively been cited.

Section-III : This section is intended to the introduction of some famous man-made laws in force in well-known countries of the contemporary world, with special focus on their grave shortcomings as compared with the perfect law of Islam.

Section–IV : This section mentions the source books written on the law of Islam. Almost 2500 juristic references have been mentioned under this section.

Section–V: This section contains a wealth of juristic terms which a scholar needs while studying the world's legal systems. Almost one thousand terms have been mentioned and explained in this section.

This way a comprehensive book has come into existence, which, keeping in view the details and the variety of its topics, may be compared with an encyclopedia. This book is never the final word on the subject, yet the work is more detailed and comprehensive as compared to those done so far.

This book, *Insha Allah*, will prove a guiding light for many of the future scholars and will bring newer avenues for research in the subjects. The work will progress and something better is expected to appear. May Allah accept this service.

Ulama and the scholars are expected to treat with indulgence the shortcomings and faults they may come across during the study of the book and, instead of subjecting the areas of their disagreement to debate and criticism, the better course would be to enlighten me with whatever is right. I will never hesitate in accepting the right.

ACKNOWLEDGEMENT

For the preparation of the book I am highly grateful to my venerable teachers who helped me and honoured me with their apt advices which solved many of my difficulties. In this connection I will never forget the late Qazi Mujahidul Islam Qasmi. His great erudition, exceptional knowledge of Fiqh and

deep insights into the Islamic learning offered the material and substance for my juristic voyage. May Allah bestow His forgiveness on him. Had he been among us now, his pleasure would have been beyond measure. Haz. Maulana Mufti Saed Ahmad Palanpuri deserves special mention here for his academic and juristic guidance he always offered me and for his encouraging gestures.

Likewise, mention must be made of Maulan Mufti Zafirud- Din Miftahi and Maulana Md. Nimatullah Azami, who have been kind enough to preface the book with their encouraging impressions.

Besides the above, there are indeed many others who rendered their valuable assistance in more ways than one They are too many to be mentioned individually. May Allah reward them best and protect them from evils.

Akhtar Imam Adil

TRANSLATOR'S NOTE

Maulana Mufti Akhtar Imam Adil's two-volume fresh compilation *Qawamine Alam mei Islami Qanum Ka Imtiyaz*, is indeed a unique work. It brings together material dealing with (a) basic theoretical discussion on almost all important aspects of the Islamic Fiqh, and (b) on the practical relevance to human life in the ever-changing time and clime. It is a marvelous compilation containing indispensably useful material on the Islamic Fiqh and its comparison.

It is a must for the researcher, the teachers and all those associated with the law of Islam by any way. The selection of material is appropriate. If fills the gap that existed on the subject especially in the Urdu and other Asian languages.

For undertaking such an excellent compilation of high academic value, which satisfies the needs of the academician, the scholars and those wishing to conduct a thorough comparative study of the Islamic Fiqh, the learned author has rendered great service not merely to the Legal fraternity but to all those who are interested in the study of the Islamic Law and wish to attain a deeper knowledge of it age-wise development, its outstanding features and points of distinction.

The book originally exists in the Urdu language the language of the Muslim scholarship in the subcontinent. No sooner it appeared and saw the light of the day, the need was felt to bring its English version in order to satisfy the quest of the English readership. For this onerous task the learned author's choice fell upon me and he asked me to undertake the English Translation of the book. Commissioned by the author, I commenced the work. After going through the entire book my impression was that with a view to translate it into English the book needed a re-editing and abridgement. I communicated my feeling to the author and he was kind enough to grant me the permission for the same. The original Urdu work comprises five sections. In the English, however, the fourth and the fifth ones were regarded unnecessary. Hence left out Besides this act of major editing, other discretionary changes and minor omissions have also been attempted.

Regarding the translation of the book the following point has to be kept in consideration.

Translation is a difficult task. The difficulty may assume new dimensions when the nature of the source language and the target language is vast. While the Urdu is the language of overstatement, the English is the language of understatement. In such a case literal translation is almost impossible; it may convey only the outer shell of the source language. Hence a literal translation has not been attempted. Even so, I have tried my best to maintain a maximum closeness to the original text.

Md. Ibrahim Khan

14.12.2013

SECTION-ONE

- **Understanding the meaning and the connotative purport of law.**
- **An introduction to the Islamic Law and its distinctive features.**
- **Age-wise development of the Law of Islam and Special Characteristics of each.**
- **Islam and International Law.**
- **A subject wise comparison between the Islamic Law and the man-made Law.**
- **Fiqhi activism and tendencies of the modern age.**

بسم اللّٰه الرحمٰن الرحيم

CHAPTER 1

Beginning of the Concept of Law

Law and a legal system is from among the basic human requirements, failing which human life can not be regulated. That is why in almost all nations and times the concept and existence of a legal system is historically found. In the history of the world two types of the laws have been found ever since the very first age of the human history. (1) Islamic law or the revealed law (2) man-made law. The Islamic law may also be described as the law of Allah or the sacred law.

Origin of the man-made law

Nothing categorical could be said as to how did the man-made law came into being. Whatever has been said in this regard lacks concrete historic proofs. Apart from the historical aspect of its origin and coming into being, whatever has been said by the historicists is this regard in, briefly, that the commencement of the human history is closely associated with the familial and social existence of human beings. The collective co-existence of various families and their interactions brought about the concept of a social unity. The stronger perpetrated injustices against the weaker and the sense of protecting one's rights spurred the need of a legal system. The Local and national customs and traditions provided the basic material for the laws. The tribal chiefs and the dignitaries exercised their fuller will and discretion.

Of the traditions and customs recognized as laws by the tribal chiefs and the men at the helm were those which were in consonance with their wishes and whims. This being the origin point of the man-made laws. Then the growing sense of insecurity in various families and the groups of people of different origins gave rise to the concept of legal unity. This way came into being the law for the state and nation. Then, in order to secure itself and ensure its safety and security, each nation and state had to take steps to formulate a set of rules for itself. This is what may be said to trace back the origin of the man-made legal systems.

The origin of the Law of Islam

The origin of the Islamic law may be traced back to the prophetic life of the Haz. Adam (may the blessings of Allah be upon him), the very first man and the first prophet. Although history speaks nothing as to the details and the scope of the Islamic legal system in those days, yet from the study of the Qur'an might be gathered various aspects of the legal system. We, simultaneously, gather that this law has sprung from the fountainhead of the Divine Guidance rather than being the offshoot of the human mind and intellect. The following verse speaks of the basic concept of the Divine Law.

قُلْنَا ٱهْبِطُوا۟ مِنْهَا جَمِيعًا ۖ فَإِمَّا يَأْتِيَنَّكُم مِّنِّى هُدًى فَمَن تَبِعَ هُدَاىَ
فَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ (٣٨)

وَٱلَّذِينَ كَفَرُوا۟ وَكَذَّبُوا۟ بِـَٔايَٰتِنَآ أُو۟لَٰٓئِكَ أَصْحَٰبُ ٱلنَّارِ ۖ هُمْ فِيهَا
خَٰلِدُونَ (٣٩)

> We said, "Go down from it, all of you. And when guidance comes to you from Me, whoever follows My guidance - there will be no fear concerning them, nor will they grieve."

In this verse we find the primary concept of the Divine sacred law. The wording of the verse also denotes that the Divine Law is mandatory by nature, with no exception to any body else.

وَقُلْنَا يَٰٓـَٔادَمُ ٱسْكُنْ أَنتَ وَزَوْجُكَ ٱلْجَنَّةَ وَكُلَا مِنْهَا رَغَدًا حَيْثُ
شِئْتُمَا وَلَا تَقْرَبَا هَٰذِهِ ٱلشَّجَرَةَ فَتَكُونَا مِنَ ٱلظَّٰلِمِينَ (٣٥)

> And We said, "O Adam, dwell, you and your wife, in Paradise and eat therefrom in [ease and] abundance from wherever you will. But do not approach this tree, lest you be among the wrongdoers."

This verse speaks of the personal and familial life besides implications to the basic concept of the law of prohibition. Same way, the verse No.27 and a number of the subsequent ones of Surah al-Maidah, refer briefly to the discord which had erupted between two sons of Haz. Adam over a familial matter, and which ultimately resulted in the assassination of a son out of the two disputing ones, and do contain a number of other significant legal implications. For instance, both the disputing sons accepted the arbitration of the sacrificial offer in connection with the dispute. This also leads to a legal system and organizational framework of a legal code.

The concept that the bloodshed and mischief-making constitutes a grave sin is suggested by the wording of the verses 28 and 29.

Then, moved by the envious passions, when one brother killed the another one, the fear of the society and a deep sense of sinfulness compelled him to hide the corpse of his slain brother and the natural way to dispose of the dead body was taught to him, under the indirect Divine guidance, by a crow.

In short, in the story of Haz. Adam we have traces of a number of laws. After Haz. Adam, as the human society developed, the change and development of the Divine Law kept pace, under various succeeding Messengers of Allah, with the change and development of the human society. This is in spite of the fact that primary tenets of the Divine Law remained unchanged, till Allah, *Subhanahu wa ta'ala,* sent down His perfect and final law on His Final Messenger Haz. Muhammad(peace and blessing of Allah be upon him). This perfect and final version of the Law of Allah is so comprehensive that it will remain always useful for all times and climes till the Final Day of the world. This is a fact whose veracity has withstood the test of a time longer than fourteen centuries.

The relevant verses of the Surah Al-Maidah are the following ones:

۞ وَٱتۡلُ عَلَيۡهِمۡ نَبَأَ ٱبۡنَيۡ ءَادَمَ بِٱلۡحَقِّ إِذۡ قَرَّبَا قُرۡبَانٗا فَتُقُبِّلَ مِنۡ
أَحَدِهِمَا وَلَمۡ يُتَقَبَّلۡ مِنَ ٱلۡأٓخَرِ قَالَ لَأَقۡتُلَنَّكَۖ قَالَ إِنَّمَا يَتَقَبَّلُ ٱللَّهُ
مِنَ ٱلۡمُتَّقِينَ ﴿٢٧﴾

> And recite to them the story of the two sons of 'Adam rightly: When both of them offered a sacrifice it was accepted from one of them, and was not accepted from the other. He said, "I will kill you". He said, "Allah accepts only from the God-fearing.

لَئِنۢ بَسَطتَ إِلَيَّ يَدَكَ لِتَقۡتُلَنِي مَآ أَنَا۠ بِبَاسِطٖ يَدِيَ إِلَيۡكَ لِأَقۡتُلَكَۖ إِنِّيٓ
أَخَافُ ٱللَّهَ رَبَّ ٱلۡعَٰلَمِينَ ﴿٢٨﴾

> If you stretch your hand towards me to kill me, I am not going to stretch my hand towards you to kill you. Indeed, I fear Allah, the Lord of the worlds.

إِنِّيٓ أُرِيدُ أَن تَبُوٓأَ بِإِثۡمِي وَإِثۡمِكَ فَتَكُونَ مِنۡ أَصۡحَٰبِ ٱلنَّارِۚ وَذَٰلِكَ
جَزَٰٓؤُاْ ٱلظَّٰلِمِينَ ﴿٢٩﴾

I would rather let you bear my sin and your sin, and then become one of the people of the fire. That is the punishment of the unjust."

فَطَوَّعَتۡ لَهُۥ نَفۡسُهُۥ قَتۡلَ أَخِيهِ فَقَتَلَهُۥ فَأَصۡبَحَ مِنَ
ٱلۡخَٰسِرِينَ ﴿٣٠﴾

His self, however, prompted him to kill his brother, so he killed him and became one of the losers.

فَبَعَثَ ٱللَّهُ غُرَابٗا يَبۡحَثُ فِي ٱلۡأَرۡضِ لِيُرِيَهُۥ كَيۡفَ يُوَٰرِي سَوۡءَةَ
أَخِيهِۚ قَالَ يَٰوَيۡلَتَىٰٓ أَعَجَزۡتُ أَنۡ أَكُونَ مِثۡلَ هَٰذَا ٱلۡغُرَابِ فَأُوَٰرِيَ
سَوۡءَةَ أَخِيۖ فَأَصۡبَحَ مِنَ ٱلنَّٰدِمِينَ ﴿٣١﴾

Then, Allah sent a crow that scratched the earth to show him how he should conceal the corpse of his brother. He said, "Alas! Was I not even able to be like this crow so that I could conceal the corpse of my brother? So, he stood regretful.

CHAPTER 2

ARABS BEFORE ISLAM

(Since Arabs are the people to whom the message of Islam and the final law of Allah was directly addressed, it will be in order to have a look at their pre-Islamic condition and the modes of their living. This will reassert the truth of the fact that an undeveloped people, living almost a primitive life, was entirely unable to offer the world a supremely perfect system of law as of Islam and this Shariat is indeed from Allah *ta'ala*, Who sent down it on Muhammad, His Final Messenger. This will help us in properly understanding the phenomenal fact how the Islamic Shariat and the final Divine Law is full of vivacity and the capacity of development and constructive revolution so that it was able to make an 'unlettered' and uncivilized people the flag-bearer of a highly comprehensive law for the humankind which very successfully restructured the affairs of the wretched and disoriented human life according to its ideology and specific scheme, and in the process overturned all the previous legal systems of the world.)

Social and Economic Condition

The term Arab is applied to the people living within the territories of the Arabian peninsula. At the time of the Prophet's advent the peninsular population consisted of two types of people: bedoins, and the urban. Most of the Arabs were bedoins, living a nomadic and roving life, and removing their tents as time and opportunity offered from place to place. Mostly, the animals constituted their chief economic resource, or the property and the substance they looted from the trade caravans.

As regard the urban people, they lived in different cities and the urban areas of the peninsula. In the north of the peninsula, for instance, the city of Saria and Adan and in the Hijaz the city of Makkah and Madinah were well-known. For their economy they, for the most part, trusted the agricultural, trade and artisan activities. Some cities there held the position of the trade centres and the trade activities developed in the people an acute sense of trade and industry.

Their trade activities were governed by some rules and norms they had formulated for the purpose.

No Doubt they had some moral weaknesses like hard-heartedness, emotionalism, provocativeness, plundering, burying their daughters alive for the fear of hunger and destitution, etc. Revenge-seeking, bearing malice and hatredness constituted a hereditary character of their moral fibre. But, on the other hand, they had some noble morals as well-magnanimity, hospitality, bravery, boldness, honoring their pledges, sticking to their word, etc, to mention a few.

In short, the Arabs of the Prophet's age possessed great ability for improvement; they needed only a revolutionary personality. They were fortunate enough to find this revolutionary person in Muhammad, the Final Messenger of Allah to mankind.

Their Religious Condition

With the exception of some clans and tribes, the majority of the Arabs was polytheist and idolatrous. Some tribes had adopted Christianity and Zaroastrianism. For instance, the Tamim tribe had professed Christianity. Some Arab tribes were without any religion. Some others, in the same way, had entered Jewish religion. There were people who used to offer their devotional services to stars, most mentionable of those stars was Shera. Some Arab believed in the sanctity of some animals and would offer the animals to the graves, hoping that those offerings would take them closer to Allah. They had great interest in drinking, gambling and speculating. They claimed that the idols were not the object of their worship in reality, they worshipped the idols only with the belief that their worship would fetch them their intercession with Allah. The Qur'an mentions their this meaningless claim in the following words.

أَلَا لِلَّهِ ٱلدِّينُ ٱلۡخَالِصُۚ وَٱلَّذِينَ ٱتَّخَذُواْ مِن دُونِهِۦٓ أَوۡلِيَآءَ مَا
نَعۡبُدُهُمۡ إِلَّا لِيُقَرِّبُونَآ إِلَى ٱللَّهِ زُلۡفَىٰٓ إِنَّ ٱللَّهَ يَحۡكُمُ بَيۡنَهُمۡ فِي مَا هُمۡ
فِيهِ يَخۡتَلِفُونَۗ إِنَّ ٱللَّهَ لَا يَهۡدِي مَنۡ هُوَ كَٰذِبٞ كَفَّارٞ ٣

Is not for Allah the pure religion and devotion? And those who have made others than Him their protectors say: we only worship them in order that they may bring us nearer to Allah", Allah will judge

> between them in that wherein they differ. Allah guides not such as are false and ungrateful.(1)

There were some Arab sages who did not believe in the intercession of the idols, for example, Warqa bin Nawafil, Umayya Bin Al-Salt, Zaid Bin Amr, etc., to name only a few.

They had the concept of worship; they offered prayers, observed fast of the Ashura and undertook pilgrimage to the Holy House in the city of Makkah, going round the Holy sanctuary and Offering prayers there. Yet, many absurdities had crept into the modes of their worship. They, for instance, coloured the holy sanctuary with the blood of the animal sacrificial offers and would clap and blow whistle in their prayers. The Holy Qur'an has depicted their worship and prayers in the following words:

وَمَا كَانَ صَلَاتُهُمْ عِندَ ٱلْبَيْتِ إِلَّا مُكَآءً وَتَصْدِيَةً ۚ
فَذُوقُوا۟ ٱلْعَذَابَ بِمَا كُنتُمْ تَكْفُرُونَ ﴿٣٥﴾

> Their prayer at the House (of Allah) is nothing but whistling and clapping of hands. So taste (now) the penalty because you blasphemed.[2]

The Hajj, one from among the four supermost pillars of the Islamic System of worship, was reduced by the pagan Arabs to their absurd and meaningless wishes. They often would change its timing to suit their purposes. They had altered even its ways of offering. They, for example, performed the *tawaf* round the Holy House with no wearing on their bodies. To exhibit their distinct position amongst all other tribes of the peninsula the Quraisysh, the inherently associated with the services of the Holy House, had exempted themselves from the duty of stay at Arafa. Like this they had brought more than one absurd practices to the original concept and practices of the Hajj. After the advent of Islam an end was put to all such non-sensical and baseless concepts and practices. The teachings of Islam removed all such paganistic pride and racial distinctions. It declared that there would be no type of exemption from or distinction for any one else in the matters of the acts of worship, and the

---

1-Surah Zumar :3

2-Surah Anfal : 35

Quraiysh, too, would as much be required to perform all the acts of worships in the course of Hajj as do all others. To quote the relevant words of the Qur'an.

ثُمَّ أَفِيضُوا۟ مِنْ حَيْثُ أَفَاضَ ٱلنَّاسُ وَٱسْتَغْفِرُوا۟ ٱللَّهَ ۚ
إِنَّ ٱللَّهَ غَفُورٌ رَّحِيمٌ ﴿١٩٩﴾

> Then pass on at the quill pase bron the place where it is usual for the people. So to do, and ask for Allah's forgiveness, Allah is the most Forgiver, the most merciful.[3]

Their Condition of Knowledge

The majority of the Arabs was unlettered, with no degree of knowledge of reading and writing. The Holy Qur'an says:

هُوَ ٱلَّذِى بَعَثَ فِى ٱلْأُمِّيِّـۧنَ رَسُولًا مِّنْهُمْ يَتْلُوا۟ عَلَيْهِمْ ءَايَـٰتِهِۦ وَيُزَكِّيهِمْ
وَيُعَلِّمُهُمُ ٱلْكِتَـٰبَ وَٱلْحِكْمَةَ وَإِن كَانُوا۟ مِن قَبْلُ لَفِى ضَلَـٰلٍ مُّبِينٍ ﴿٢﴾

> It is He who has sent among the unlettered a Messenger from themselves reciting to them His verses and purifying them and teaching them the Book and wisdom - although they were before in clear error.[4]
>
> The Prophet Muhammad (peace and blessings of Allah be upon him) himself was quite unlettered. To quote the Qur'an again:

وَمَا كُنتَ تَتْلُوا۟ مِن قَبْلِهِۦ مِن كِتَـٰبٍ وَلَا تَخُطُّهُۥ بِيَمِينِكَ ۖ إِذًا
لَّٱرْتَابَ ٱلْمُبْطِلُونَ ﴿٤٨﴾

> And you was not (able) to recite a Book before this (Book came), nor are you (able) to transcribe it with your right hand. Had so been the case, indeed would the talkers of vanities have doubted.[5]

---

[3] Al-Qur'an, 2:199.

[4] Al-Qur'an, 62:2.

[5] Al-Qur'an, 26:48.

> Unlike their neighboring nations such as the Romans, Iranians, Egyptians, etc. the Arabs were not in possession of any systematic source of knowledge of philosophy or cultural traditions to benefit from.

However, it never means that they were totally bereft of knowledge and the cultural traditions. They possessed a very high degree of institutionalized branches of knowledge, for instance, the Arabic language and literature, poetry, history and biography, prosody and the artistic and highly skilled use of their linguistic knowledge. In the knowledge of their language and the related arts they stood doubtlessly peerless. That is why the Qur'an, a Divine marvel both in respect of high knowledge and matchless linguistic and literary excellence, addressed them and challenged their linguistic competence. When they refused to accept the truth of the Holy Qur'an, the Qur'an challenged them that if it was from any one else other than Allah ta'ala, produce a surah like it in terms of linguistic standards.

In the same way, they possessed a good knowledge of astrology and seasons. Also they were able to determine the direction of air and rain. Their good astrological knowledge and experience helped them determine the correct directions while travelling through the limitless desert. With respect to different stars they had many baseless beliefs and often ascribed to them the man's change of fortunes.

After its advent Islam refuted their baseless beliefs and exposed their falsity to them in clear words. They had a good medical knowledge, largely based on their personal experiences rather than as systematic acquisition. Islam upheld the treatment of diseases and declared that Allah ta'ala has created medicine and remedy against each disease. To quote the Prophet's own words.

> (Allah ta'ala has sent down both the disease and the remedy; and for each disease has made a medicine and remedy. So, do treat the diseases with the medicines but never with the unlawful things and ways).[6]

As regard the spiritual ways of treatment in contacting the amulets, the Holy Prophet is reported to have declared the position of Islam about them in the following words:

---

[6] Abu Dawood, Mishkat Book of Tibb and Ruqa 388.

> There is nothing wrong in incantation and amulets as long as it is free from the elements and ways of *shirk*) [associating others with Allah in His Attributes and His authority in supernatural terms].[7]

They had the knowledge of astronomy, soothsaying, divination, etc. All such branches of knowledge constituted, according to their beliefs, the source of the future knowledge. Islam declared that all the above-mentioned branches of human knowledge can never be the source of the future knowledge. It is the *wahy* (Revelation) only which is a trustful source of the unseen knowledge. To quote the Qur'an:

عَٰلِمُ ٱلۡغَيۡبِ فَلَا يُظۡهِرُ عَلَىٰ غَيۡبِهِۦٓ أَحَدًا ﴿٢٦﴾

> [He is] Knower of the unseen, and He does not disclose His [knowledge of the] unseen to anyone.7

إِلَّا مَنِ ٱرۡتَضَىٰ مِن رَّسُولٖ فَإِنَّهُۥ يَسۡلُكُ مِنۢ بَيۡنِ يَدَيۡهِ وَمِنۡ خَلۡفِهِۦ
رَصَدٗا ﴿٢٧﴾

> Except whom He has approved of messengers, and indeed, He sends before each messenger and behind him observers.[8]

قُل لَّآ أَمۡلِكُ لِنَفۡسِي نَفۡعٗا وَلَا ضَرًّا إِلَّا مَا شَآءَ ٱللَّهُۚ وَلَوۡ كُنتُ أَعۡلَمُ
ٱلۡغَيۡبَ لَٱسۡتَكۡثَرۡتُ مِنَ ٱلۡخَيۡرِ وَمَا مَسَّنِيَ ٱلسُّوٓءُۚ إِنۡ أَنَا۠ إِلَّا نَذِيرٞ
وَبَشِيرٞ لِّقَوۡمٖ يُؤۡمِنُونَ ﴿١٨٨﴾

> Say: "I have no power over any good or harm to my self except as Allah wills. If I had knowledge of the unseen, I would have multiplied all good, and no evil would have ever touched me. I am but a warner and a bringer of glad news to those who have faith.[9]

---

[7] Muslim, Mishkat, Book of Tibb and al Ruqa.388.

[8] Al-Qur'an, 72:26,.

[9] Al-Qur'an: Al Aaraf-:188.

Legal Condition of Arab Society

The legal condition of the Arab society, when the laws of Islam came into force, was that of a people which had not yet, generally speaking, completely lost its nomadic habits and characteristics. The Arabs were divided into tribes and sub-tribes, and these latter again into families. They were often at hostilities with each other, and on such occasions there was no recognized usage or general public opinion restraining the actions of the members of one tribe towards those of the other. But for some time a number of tribes had united together by compact for the purposes of offence and defence, and this had the effect of ensuring peace for a sufficient length of time to allow for the growth of law. Such was specially the case in large cities like Makkah and Madina. Makkah, which was the place of pilgrimage, contained a large and powerful population composed of several tribes bound together by ties of kinship and common interests. These two cities and some seaport towns were centres of busy trade, and the merchandise of, at least, some parts of Asia passed through them to Europe. We also find that marts used to be held at different places almost the entire year round. Besides the town populations there were the Arabs of the desert known as the Bedouins. They led a roving life, removing their tents as time and opportunity offered from place to place. Each of these tribes had no doubt its own peculiar usages. Our account is mostly concerned with customs that prevailed among the inhabitants of the principal cities; but the general characteristics of the customary law of the populations of the towns and of the desert did not differ in essentials. Only the one tended to a more settled form than the other. The bulk of the Arab population were idolaters but there were some among them who had adopted Christianity, and some were Magians in religion. A large and influential community of Jews had for a long time settled in Madina with their own laws and usages. They were also found in southern Arabia.

The Chief and his functions

The Arabs of Arabia at the time of the Prophet had no certain constitution and nothing like a settled form of government, whatever might have been the condition of things previously. Each tribe elected its own chief. He was generally as man who by his nobility of birth, age and reputation for wisdom, won the confidence and respect of his fellow tribesmen. His most important function was to represent his tribe in its relations with the other tribes. Sometimes he was assisted in the discharge of this duties by a council of elders. Within the limits of his tribe his orders and decisions were enforced not by ay fixed machinery at his disposal, for properly speaking there was no constituted State, but by the force of tribal opinion. Sometimes it happened that the culprit belonged to a powerful family, and his kinsmen would refuse to surrender him to the chief of the tribe for punishment. That family would then break away and join another tribe and become their Ahlaf (sworn allies). If the culprit escaped alive and took refuge with a rival tribe, he would be called Dakhil (lite. One who has entered).

Things were tending towards settled Government at Makkah

In Makkah, however, things were tending towards the formation of a government. The tribes that composed the non-migratory population of that city had in their custody the Ka'ba, which was a place not only of public worship, but of many social and political ceremonials. The public offices were divided among the twelve principal tribes or families. Of these the office of deciding disputes was delegated to one tribe and used to be exercised by its chief.

The duty incidental to another important office was for the chief who held it to pay from his own pocket fines and compensations for wrongs committed by any of his tribesmen towards a member of another tribe, Abu Bakr, who afterwards became the first Caliph is Islam, held this office for some time.

What happened in the case of an offence committed by a member of one tribe against a member of another tribe?

If a member of one tribe killed a member of another tribe, no distinction being made whether it was wilful or otherwise, the heirs or chief of the tribe of the deceased were entitled to demand that the offender should be given up to them to suffer death. But the matter might be compounded by payment of a fine or compensation amounting to a hundred camels. If the two tribes happened to be at amity with each other, and the person accused denied the charge, then, on a number of men belonging to his tribe pledging their oaths to his innocence, the matter would be dropped. A case is reported in 'Al-Bukhari'[10] which is important as illustrating the custom of the Arabs in this connexion. A man of the family of Banu Hashim was hired by a man called Khadish, belonging to another branch of the tribe of Quraish, to go with him to Syria in charge of his camels. On the way, because the hired man had given away a tether rope to a passer-by without his master's knowledge, the latter in rage threw a stick at him which, happening to strike the man in a vital part, caused his death. But before he died, he saw a man of Yaman happening to pass that way, and requested him when he arrived in Makkah to tell Abu Talib, the chief of his Family, how he had been killed by his employer for the sake of a tether rope. When the employer afterwards returned to Makkah, Abu Talib inquired of him what had happened to his man, and he said that he had sickened on the way and died. Subsequently, however, the man of Yaman, who had been charged with the message by the deceased, came to Makkah and communicated the same to Abu Talib. The man who had engaged the deceased was then doing the *Tawaf* of the Ka'ba. A member of the family of Banu Hashim went up to him and struck him saying 'You have killed one of our men', but Khadish denied the charge. Abu Talib next went up to the men', but Khadish denied the charge. Abu Talib next went up to the man and said: 'Choose at our hands one of three things: if you wish, give a hundred camels for the murder of our kinsman., or, if you wish get fifty of our tribesmen to swear that you have not killed him. If you refuse either of these, we will kill you in his place'. But, according to Zubair-ibn Bakkar, both the parties referred the case to Walid ibnu'l Maghira, who decided that fifty men of Banu Amir-the family of the man charged-should swear before the Ka'ba that Khadish had not killed the man. Khadish spoke to his kinsmen, and they said that they would swear that he had not killed him. Then a woman of Banu Hashim, who was married to a man of Banu Amir and had born him a son, came to Abu Talib and requested him to accept her son as one of the fifty and forgo his oath. Abu Talib acceded to her request. Next a member of the family of the accused person came to Abu Talib and said:'You want fifty men to swear in lieu of payment of a hundred camels, so it comes to two camels for every man's oath. Take from me two camels and do not insist on my taking the oath at the place where oaths are taken'. Abu Talib accepted the two camels, and forty-eight men came and took the oath.

---

[10] Delhi edition, vol. i. p. 542.

Procedure

The procedure that used to be adopted when a dispute or claim had to be decided was to call upon the plaintiff to supply proof in support of his claim. If he had no witnesses, the defendant, in case he denied the charge, would be given the oath, and if he took it he would be absolved thereby of all liabilities. Sometimes the parties would go to a diviner and abide by his decision. If a suspected person was a slave, torture was sometimes resorted to in order to extort a confession.

Oaths

Oaths formed an important part of the procedure in settling a dispute. An oath was held in great reverence, not merely as an inducement to speak the truth, but was regarded in the nature of an ordeal finally settling the dispute. Much solemnity was attached to the ceremony of administering it and a place called Hatim (lit. one the destroys, referring to the belief that a man taking a false oath would be destroyed by the deities) was set apart just outside the Ka'ba for this purpose. The exact form of the oath is not known, but it appears that the pre-Islamic Arabs used to swear by Hubal, their chief deity, or by their ancestors, and at the end of the ceremony would thorw down a whip or sandals or a bow as a token that they had taken a binding oath.[11]

Customs regulating relations between the sexes; Temporary or *mut'a* marriage.

The customs regulating the relations of the sexes and the status of the children, issue of such relations, were at the time of the establishment of Islam uncertain and in a state of transition. Side by side, with a regular form of marriage, which fixed the relative rights and obligations of the parties and determined the status of the children, there flourished types of sexual connexion under the name of marriage, which are instructive as relics of the different stages through which the Arabian society must have passed. It is narrated that there were four kinds of marriage in vogue at the time when the Islamic laws came into force: '(1) A form of marriage which has been sanctioned by Islam, namely, a man asks another for the hand of the latter's ward or daughter, and then marries her by giving her a dower. (2) A custom according to which a man would say to wife: "Send for so and so (naming a famous man) and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated, but after her pregnancy became apparent, he would return to her. This originated from a desire to secure noble seed. (3) A number of men, less than ten, used t go to a woman and have sexual connexion with her. If she conceived and delivered a child, she would send for them, and they would be all bound to come. When they came and assembled, the woman would address them saying: "You know what has happened. I have now brought forth a child. O so and so? (naming whomsoever of them she chose), this is your son." The child would then be ascribed to him, and he was not allowed to disclaim its paternity. (4) A number of men used to visit a woman who would not refuse any visitors. These women were prostitutes and used to fix at the doors of their tents a flag as a sign of their calling. If a woman of this class conceived for brought forth a child, the men that frequented her house would be assembled, and physiognomists used to decide to whom the child belonged'.[12] of the above, the first form of marriage must have been of the latest growth, and apparently it is mere contradiction in terms to call the rest examples of forms of marriage. It admits of no doubt that the Arabs used also to contract has been called a temporary marriage under the name of mut'a. It is stated in the 'Fathu'l-Qadir'[13]: When a man came to a village and he had no acquaintance there (to take care of his house), he would marry a woman for as long as he thought he would stay, so that would be his partner in bed and take care of his house'.

---

[11] 'Qustalani' (Bulaq edition) vol vi. pp. 176, 1892

Dower

In the regular form of marriage the fixing of *Mahr* or dower for the benefit of the wife was in vogue among the pre-Islamic Arabs. It formed a part of the marriage contract, but in some cases the guardian of the girl used to take the dower himself.[14] Whether such an appropriation was mere violation of the ordinary usage, or whether it showed that dower was originally the price paid for the bride to the parents, and that the payment to her was but a later development, can only be a mere matter of conjecture. At all events, at the time of the Prophet dower was regarded as a principle term of the marriage contract and the right of the wife. Its payment, in the event of divorce or death of the husband, was enforced by the voice of public opinion, or by the power of the woman's relatives, unless it had been paid at the time of the marriage. A device used at times to be resorted to under the name of of *Shighar* marriage[15] in order to deprive the wife of her dower. A man would give his daughter or sister in marriage to the former. In such a form of marriage neither of the wives would get a dower. Unchastity on the part of the wife made her liable to the forfeiture of her dower and frequently as false charge used to be brought against the wife by the husband, so that he might get rid of her without paying the dower.[16] And many a time a divorced wife or a widow would be coerced to give up her claim to dower or to restore it, if it had been already paid.

---

[12] 'kashfu'l-Ghumma' vol. ii p. 56

[13] vide vol. iii p. 151

[14] 'Tafsir-i-Ahmadi', p. 226.

[15] 'kashfu'l-ghumma', vol. ii p. 52

[16] "Tafsir-Ahmadi', p. 257

Woman was not a free agent in marriage

Before Islam a woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin or nay other male guardian to give her in marriage, whether she was old or young, widow or virgin to whomsoever he chose. Her consent was of no moment. There was even a practice prevalent of marrying women by force. This often happened on the death of a man leaving widows. His son or other widows (excepting his natural mother), and this was a symbol tat he had annexed them to himself. If widow escaped to her relatives before the sheet was thrown over her, the heirs of the deceased would to pay the dower. This custom is described as the inheriting a deceased man's widows by his heirs, who, in such cases, would divide them among themselves like goods.[17]

No restriction as to the number of wives

There was no restriction as to the number of wives as Arab could take, The only limit was that imposed by his means, opportunity and inclinations. Unrestricted polygamy which was sanctioned by usage was universally prevalent. This was exclusive of the number of salve-girls which a man might possess.[18]

Prohibited degrees

The limits of relationship within which marriage was prohibited were narrow and defined only by close degree of consanguinity.

There can be no doubt that an Arab could not marry his mother, grand mother, sister, daughter or grand-daughter, and perhaps he was not allowed to marry his aunt, and niece. But those among them that followed the Magian religion could marry their own daughters and sisters. An Arab was permitted to take as his wife his step-mother, cousin, wife's sisters and could combine in marriage two sisters or a woman and her niece. It is doubtful whether he could marry his mother-in-law or step-daughter.[19]

---

[17] Ibid, p. 256.

[18] Kashiful-Ghumma', vol ii. Pp. 54-56.

[19] See. W. Robertson Smith's Kinship and Marriage in early Arabia P.164

Divorce Talaq; *Ila*

Unrestrained as an Arab was in the number of his wives, he was likewise absolutely free to release himself from the marital tie. His power in this connexion was absolute, and he was not required or expected to assign any reason for its exercise, nor was he under the necessity of observing any particular procedure. The word commonly used for this purpose was *talaq*. It depended upon his discretion whether he would dissolve the marriage absolutely and thus set the woman free to marry again or not. He might, if he so chose, revoke the divorce and resume marital connesion. Sometime an Arab would pronounce talaq ten times and take his wife back again divorce her and then take her back and so on.[20] The wife in such a predicament was entirely at the mercy of the husband and would not know when he was free. Sometimes the husband would renounce his wife by means of what was called a suspensory divorce.[21] This procedure did not dissolve the marriage, but it only enabled the husband to refuse to live with his wife, while the latter was not at liberty to marry again. Another form of divorce in use among the Arabs was ila, the husband swearing that he would have nothing to do with his wife. [22] According to some, such an oath had the effect of causing an instant separation, but others say that it was regarded as suspensory divorce. Sometime, when an Arab wanted to divorce his wife, he would say that she was alike the back of his mother. This would have the effect of an irrevocable divorce and was known as *zihar* (from *zahr* Zihar back).[23]

Khula'

The wife among the Arabs had no corresponding right to release herself from the bond of marriage. But her parents, by a friendly arrangement with the husband, could obtain a separation by returning the dower if it had been paid, or by agreeing to forgo it if not paid. Such an arrangement was called *khula,* lit. stripping, and by it the marriage tie would be absolutely dissolved.

Effect of divorce; Iddat

A woman if absolutely separated by talaq, *zihar ila*' or *khula* might remarry, but she could not do so until some time, called the period of *idda*, had elapsed. This precaution was vidently observed in the interest of the child that might be in the womb. But an Arab before Islam would sometimes divorce his pregnant wife, and she would, under an agreement with him, be taken over in marriage by another. On the death of the husband the period of iddat was one year.

---

[20] 'Tafsir-i-Ahmaid' p. 130

[21] Ibid p. 121

[22] Ibid, p. 122

[23] Tafsir-i-Ahmadi p.160

Legitimacy

The status of a child was determined not merely by marriage but also other forms of sexual relations. Regarding the issue of a regular form of marriage no doubt was entertained as to the establishment of the descent of the child from the husband of its mother. In the other cases, as we have seen, it was the right of the mother of the child to affiliated it to any one with whom she had sexual connexion.

Child by adoption

Adoption among the Arabs was also in vogue as legitimate mode of affiliation. Whether any form of ceremony was observed at the time of adoption is not known, but it seems that it was generally effected by a contract with the parents of the boy. The right to adopt was not based on any fiction, and it was not restricted by any natural born son to the adoptive father. The adopted son passed into the family of his adopter and assumed his name, and his rights and disabilities were the same as those of a natural born son.[24]

Female infanticide

In proportion to his eagerness to have a son, an Arab father regarded the birth of a daughter as calamity, partly at least because of the degraded status of women. Even in the time of the Prophet female infanticide was prevalent, and many fathers used to bury their daughters alive as soon as they were born.

Tenure of property

The property of an Arab, generally speaking, was of a simple description. Camels, cattle, tents, clothes and a few utensils usually formed the bulk of his possessions. The use of money had been known to him for some time, and slaves were a common and valuable for in of property. In towns there were properly built houses and shops, and land had value,. Proprietorship was individual, and the principle of a joint family, with reference to the holding of property, was unknown. No distinction was made between ancestral and self-acquired moveable and immovable property. Except the places of worship there was hardly any public property.

---

[24]' Tafsir-i-Ahmadi' p. 610

With the exception of a slave who himself was the property of his master, the Arab customary law recognized the right of every one to hold property. Though a woman, as we shall see, was debarred from inheriting, she was under no disability in the matter of owning property. Anything that she might receive from her husband as dower or by a gift from or her parents and relative was absolutely hers. Sometimes women acquired riches by trade and commerce and some of them were owners of land houses. But neither the person nor possessions of a woman were safe unless she was under the protection of her parents or some male relatives or her husbands. If her protector proved rapacious or dishonest, she hardly had any remedy.

The position of an infant or *non compas mentis* was still worse and the customary law of the Arabs provided no protection to him from the dishonesty of his guardian.

Power of alienation; Different forms of sale

An Arab owner had absolute power of disposal over his property. He could, by an act *inter vivos*, alienate his entire interest by a sale or gift or only a partial or limited interest by lending, pledging or leasing. Under the name of sale enjoyed a perfect freedom of contract. Some of these transactions were purely speculative and even of a gambling nature. The following list of the different kinds of sale[25] in vogue among the per-Islamic Arabs will furnish a clue to many of the principles of transfer of property established by the Islamic Jurisprudence.

1. Sale of goods for goods (Muqayada), being an exchange or batter.
2. Sale of goods for money (Bai'), a form of sale commonly in use.
3. Sale of money for money (Sarf), or money-changing.
4. Sale in which the price was paid in advance, the article to be delivered on a future date: this sale was called Salam.
5. Sale with an option to revoke.
6. An absolute or irrevocable sale.
7. Sale of goods, the price to be paid in future.

---

[25] 'Hidaya' and 'Fathu'l-Qadir' (Egyptian edition), vol. vi, pp. 49-55; and 'Kashfu'l-Ghumma' vol. ii, pp. 6-7

8. Murabaha, a transaction in which the vendor sells the article for the cost price and certain stated profits.
9. At-Tauwaliya, sale at the cost price.
10. Wadi', sale at less than cost price.
11. Musawama, sale by bargaining.
12. Sale by throwing a stone, several pieces of cloth, for instance, being exposed for sale, the buyer throws a stone and whichever piece it falls upon becomes the property of the buyer, neither party having the option of revoking the sale.
13. Mulamasa, in this form of sale the bargain was concluded by the buyer touching the goods which at once became his property whether the vendor agreed to the price or not.
14. ~~Munabadha~~, a sale in which the shopkeeper would throw an article towards the intending buyer, this having the effect of completing the sale.
15. Muzaban, sale of dates on a tree in consideration for plucked dates.
16. Muhaqala, sale of wheat in the ears or of a foetus in the womb.
17. Mu'amila or Bai'u'l-wafa, in this form of sale the vendor of the article says to the buyer, 'I sell you for the debt which I owe you on condition that when I repay the debt you will give back the article to me'. The buyer, however, could not make use of the article without the vendor's permission.
18. A form of sale called 'two-bargains-in-one' in which the condition was that the buyer should sell the article back to the vendor within a stated period.
19. 'Urbun; in this sale the purchaser pays a portion of the price to the vendor stipulating that, if he approved of the article, he would pay the balance, otherwise he would return it, and the amount paid by him would be forfeited.
20. A sale in which the subject-matter was not in possession of the vendor at the time of the contract, but which he was to secure afterwards in order to fulfill the contract.

Leases

A lease of land used to be granted generally for the term of a year, but sometimes though rarely for two or three years. There in no record of a lease for a long term. The rent was paid either in money or part of the produce or wheat. Sometimes it used to be a condition of the lease that the lessor be supply the seed for cultivation, and sometimes that it shoud be supplied by the lessee. Of the former the tenure was called *mukhabara*, and the latter *muzara'a*. Sometimes the stipulation used to be that the lessee should cultivate the land with seed found by himself, and lessor would have for his share the crops that would grow on the portion adjoining the stream or on some other specified plot. The Arabs also used to farm out the fruit trees.[26]

Loans, riba or usury

The Arabs used to lend out money on interest, and at least among the Jews of Madina usury was rampant under the name of *riba*.[27] Loans of articles by way of accommodation were designated *ariya*, the borrower in this form of contract enjoying the use and income without consuming or disposing of the substance.

Testamentary dispositions of property

An Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts *inter vivos*. He was not limited in making testamentary dispositions to any proportion of his possessions, nor to any particular description of property. He could make the bequest in favour of any one he chose, and there was nothing to prevent him from giving away his entire property to some rich stranger, leaving his own children, parents and kindred in want. Or, if he chose, he might gave preference to one heir to the exclusion of the other.[28]

Succession and inheritance

On the death of an Arab his possessions, such as had not been disposed of, devolved on his male heirs capable of bearing arms, all females and minors being excluded.[29] The heirship was determined by consanguinity, adoption or compact. The first class consisted of sons, grandsons, father, grandfather, brothers, cousins uncles and nephews. The sons by adoption stood on the same footing as natural-born sons. The 'third class of heirs arose out of the custom by which two Arabs used to enter into a contract that, on the death of one of them, the surviving party to the contact would be an heir to the deceased or receive a certain fixed amount out of the estate. The shares of the different heirs in the heritable estate were not fixed, and it is not easy to ascertain what was the order or succession among them, if any. It appears that the chief of a tribe used to divide the estate of a deceased person among the recognized heirs, and possibly the shares allotted varied according to the circumstances. If there were grown-up sons they probably excluded daughters; wives, sister and mother did not inherit at all, but the estate was considered liable for the payment of the widow's dower, and among some tribes at least for her maintenance.

---

[26] An-Nawawi's Commentary on 'Sahih of Muslim' (Bulaq edition) vol. vi, pp. 401 and 405-407

[27] 'At-Tafsiru'l-Kabir' (Egyptian edition) vol. ii, 9. 357.

[28] 'Tafsir-i-Ahmadi', pp. 60-61.

[29] Ibid. pp. 234-235

Punishments

The pogan Arabs, likewise, had a good penal code. For instance,

(a) *qisas* (the law of equality in matter of murder). About the law of *qisas* they held it to be effective to terminate possibilities of the commission of muder in future.

(b) The payment of blood-money devolves on the *aqila*.

(c) In case a person was found stain in a locality, with no due to the killer, an oath was to be exacted from the inhabitants of that locality, wherein they expressly dissociate themselves from having any connection or knowledge about the murder. This act of oath-taking was termed as qasama.

Since the pagan Arabs had no organized and strong government; they had just a loose tribal confederation, which could never assume the position of a systematic government, the principles of the pagan legal system were rarely enforced. This often brought individual and inter-tribal struggles and disputes, mostly assuming the form of vendetta.

From the pagan legal system Islam upheld only the things which conformed to the general human expediencies, and annulled those smacking of wrong, excessiveness and contrary to the sound human nature. The Law of Retaliation, blood-money, *qasama*, etc. form part of the Islamic Fiqh, which the Islamic Shariat has incorporated into its body of laws after subjecting them to the process of correction and amendment.

To put if succinctly, the pagan Arabs had an incomplete legal system, although they possessed a fairly good legal sense. Yet, this legal sense by no means was enough to make them able to expound a system of law as much good and comprehensive as of Islam. Other countries had relatively developed legal systems, but, being generally unlettered, the Arabs had little access to those laws and benefit from them. It is a very well-established historical fact that at the time of the advent of Islam no society throughout the world was so intellectually developed as to expound a system of law as high as that of Islam.

This too establishes yet again that the Law of Islam is the Divinely Revealed Law, the origin and formulation of which owe nothing to human intellect and effort.[30]

---

[30] Extracted from: Tarikh al-Fiqhil-Islami by Dr Ahmad Hasan Farraj PP 33-41

CHAPTER 3

LAW AND THE JURISPRUDENTS OF WEST

If we attempt to clearly express the terminological difference between the Law and constitution, we may simply say that the constitution is basically intended to define the aims and objectives of the state and determine its system of polity and political framework. So far as the law is concerned, it is meant to set in order the conduct and behavior of human life both on individual and collective and social levels.

In terms of the modern age the most agreed upon definition of law is that it is a set of the rules and principles which is meant for regulating the human life, and which is prepared in consonance with the will and volition of the people and is promulgated by the State.

According to the modern western thinking the law has four fundamental constituents, that is:

1. Group of human beings
2. Rules and regulation
3. Exactions of collective recognition in respect of those laws, the rules and regulations.
4. Recognition of those laws and the rules and regulation on the part of the state and its execution of those laws through its judicial system. A law having these four things as its essential constituents could acquire the position of law. [31]

The Law: Contradicting Theories

There is no complete well-agreed answer to this question… As defined in the Oxford English Dictionary, it is 'the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects'. But in its widest sense 'the term law includes any rule of action, that is t say, any standard or pattern to which actions (whether the acts of rational agents or the operation of nature) are, or ought to be conformed'. According to Hooker the term laws applies to any kind of rule or canon whereby actins are framed, while Blackstone says that 'law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational'.

---

[31] Chiragh-e-Rah monthly, special issue on Islamic Law, Vol.12, Issue No. 6 (the article contributed by Mr. Absar Alam(MA) Lecturer Urdu College, Karachi, Pakistan).

There are several definitions of law with regard to its various functions and different aspects. Here are some of the schools of law to give us an idea of its nature and purpose.

Schools of Law

To the Teleological schools, law is the product of reason and is intimately related to the notion of purpose, so the question arises: What is the supreme end of law? Most of the philosophers regards justice as the supreme end and make a distinction, between natural and conventional justice, which leads to a great controversy and a long metaphysical discussion. Kelsen, in his attempt to free the law from the metaphysical mist, lays stress on the pure science of law. He is thus in revolt against philosophy and desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social science of law, stripped of all irrelevant material, and to separate jurisprudence from the social sciences. According to him the science of law is the study of the nature of norms set up by law. Ethics and social philosophy are, thus, far from law, while Pound emphasized the sociology of law since its is deeply concerned with the needs of society. He represents the Functional school whose tenet is that we cannot understand what a thing is unless we study what it does. To him, 'law is more than a set of abstract norms, it is also a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction'.

Savigny of the Historical school is of the opinion that the source of law is the custom which lies deeply embedded I the minds of men. This school considers law in direct relationship to the life of the community. Law evolved, as did language, by a slow process and, just as language is a peculiar product of nation's genius, so is the law. The source of law is not the command of a sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. 'Legislation can succeed only if it is in harmony with the internal convictions of the race to which it is address. If it goes farther, it is doomed to failure'. This is what Savigny thinks of law.

Austin of the Imperative School regards law as the command of the sovereign. This is, according to him, the positive law-'a general rule of conduct laid down by a political superior to a political inferior'. His aim was to separate positive law sharply from such social rules as those of custom and morality, and the emphasis on command achieves this end. The notion of command implies a threat of a sanction if it be disobeyed.

Jurisprudence, according to Austin, is a rigid science of positive law entirely concerned with the exposition of the general principles and leading terms of the law such as Right, Obligation, Injury, Sanction, Punishment and Redress. Jurisprudence, as such, has nothing to do with the goodness or badness of law and must be distinguished from legislation which is based upon the principle of utility, that is, the greatest happiness of the greatest number which is an accepted principle of the modern world and a view that finds expression in Bentham's utilitarianism.

Bentham's Philosophy

The essence of Bentham's philosophy is that 'nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgments, and all the determinations of our life. He who pretends to withdraw himself from these subjections knows not what he says. His only object is to seek pleasure and to shun pain… These eternal and irresistible sentiments ought to be the great study of the morality an the legislator. The principle of utility subjects everything to these two motives'.

Bentham bases his philosophy on the principle of greatness happiness. According to Bertrand Russell there is and obvious lacuna in Bentham's system. If every man always pursues his own pleasure, how are every many always pursues his own pleasure, how are we to secure that the legislator shall pursue the pleasure of mankind in general. Bentham's theory is criticized by many others are contradictory in itself. According to its conception of desire and motive, the whole object of attractions is the obtaining of personal pleasure, while the proper standard for judging the morality of an act is its contribution to the pleasure of others. In Bentham's theory 'desire for private pleasure as the sole motive of action and universal benevolence as the principle of approval are at war with each other'.

'It would be only a poor sort of happiness', remarked George Eliot, 'that could ever come by caring very much for our narrow pleasures'. It is, indeed, better to be a human being dissatisfied than a pig satisfied. In fact, there can be no standard of judgment as to what exactly constitutes pleasure and morally speaking, says Dewey, pleasure as an end cannot be considered 'good', for a wily person takes pleasure in his wickedness and so on. the utilitarian theory that the pleasure is the good and the end is baseless and also immoral.

So far we have dealt with the leading schools of law. A deeper study of their views discloses the fact that their concept of law is based upon two extreme positions. While one emphasizes the coercive character of law, the other lays stress on the social acceptance of it. The coercive aspects Sovereign Command and Sanctions-are pivotal to the theories of Austin and Kelsen. By contrast the social acceptance of law and the observance of it by the community are central to the theories of Savigny. To Savigny, customs are the living law which may receive authoritative confirmation from the sovereign but it is not created by him. Customs being the approved ways of the community, were regarded as of divine which the Kings received for the administration of justice, hence the Teleological school considers justice as the end of law.

'In Homer's Work', says Friedmann, 'law has an essential but unproblematical place. Law is embodied in the Themistes which the Kings receive from Zeus, the divine source of all earthly justice and which are based on custom and tradition. Justice is still identical with order and authority. An awareness of the conflict between positive law and justice becomes more and more pronounced from the eighth century onwards. It arises against a background of social trouble, of discontent with rule of aristocracy and frequent abuse of power. The problem of justice becomes articulate in the poems of Hesiod and of Solon, the great Athenian law-giver. Both appeal to Dike, the daughter of Zeus, as a guarantor of justice against earthly tyranny, violation of rights and social injustice. Solon sees Dike as rewarding civil unrest and injustice with social evils while she rewards just communities with peace and prosperity.

Greek Philosophers

Here it becomes clear why the Greek Philosophers thought of justice as the supreme end of law. It was on account of the social disorders, internal conflicts, tyranny and arbitrariness of the rulers that the need for justice became more pressing and the problem of the relation between justice and positive law dominated the Greek thinking.

Plato (429-348 B.C.), was deeply convinced of the natural inequality of men, which he considered a justification for the establishment of a class system in his common wealth. 'Justice' meant in Plato's eyes that 'a man should do his work in the station of life to which he was called by his capacities'. Every member of society, according to him, has his specific functions and should confine his activity to the proper discharge of these functions. Some men have the power of command, the capacity to govern. Other are capable of helping those in power to achieve their ends, as subordinate members of the government. Others are fit to be tradesmen or artisans, or soldiers'.

Plato, in his Republic, underplayed the necessity for law, but Aristotle (384-322 B.C.) took a teleological view of law, and formulated more carefully the theory of justice. 'He regards justice are meaning either what is lawful, or what is fair and equal. He made a useful distinction between natural justice, which is universal, and conventional or legal justice, which binds because it was decreed by a particular authority'. The former derives its force from natural law and the latter from Positive law, which reflects the tension between the two. Let us, now, turn to natural law which was sought after as a source of natural justice and a relief against the tyranny of positive law the law of the autocrats.

NATURAL LAW

Historical Background

'The history of natural law', as remarked by Friedmann, is 'a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the legal appeal to something higher that positive law. Positive law is concerned with what law 'is', and natural law with what law 'ought to be'.

The story of natural law begins with the philosophers of ancient Greece. 'The legal conceptions of the archaic age of the Greeks are known to us through the epic works of Homer and the poetry of Hesiod. Law at that time was regarded as issuing from goods and known to mankind through revelation of the divine will. Hesiod pointed out that wild animals, fish, and birds, devoured each other because law was unknown to them; but Zeus, the Chief of Olympian gods, gave law to mankind as his greatest present. Hesiod thus contrasted the nomos (ordering principle) of non-rational nature with that of the rational (or at least potentially rational) world of human beings. Foreign to his thought was the skepticism of some of the Sophists of a later age, who sought to derive a right of the strong to suppress the weak from the fact that in nature the big fish eats the little ones. To him law was an order of peace funded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter'.

Law of Fairness

This shows the conception of law, of the ancient Greeks, as founded on fairness. Law and religion remained, for them, largely undifferentiated. The famous oracle of Delphi, considered and authoritative voice for the enuication of the divine will, was frequently consulted in matters of law and legislation. The forms of law-making and adjudication were permeated with religious ceremonials, and the priests played an important role in the administration of justice. The King, as the supreme judge, was believed to have been invested with his office and authority by Zeus himself.

An incisive change in Greek Philosophy and thought took place in the fifth century B.C. Philosophy became divorced from religion, and the ancient, traditional forms of Greek life were subjected to searching criticism. Law came to be regarded not as an unchanging command of a divine being, but as a purely human invention, born of expediency and alterable at will. The concept of justice was likewise stripped of its metaphysical attributes and analyzed in terms of human psychological traits or social interests.

Justice

Those who brought about such a change in thought were called the Sophists. To them, might was right and justice nothing else than the right of the stronger, and human nature identical with egoism. Socrates set himself the task of overcoming the subjectivism and relativism of the Sophists and of establishing a substantive system of ethics based on an objectively verified theory of values. Proceeding on the lines suggested by his master, Plato, held, as stated above, the justice consists in the proper discharge of the specific functions assigned to a person, that is, 'a man should do his work in the station of life to which he was called by his capacities'. Aristotle's theory of justice is more carefully formulated. As already explained he makes a distinction between natural and conventional justice. 'Aristotle, in his Logic, sees the world as a totality comprising the whole of nature. Man is part of nature in a twofold sense: on the one hand he is part of matter, part of the creatures of God and as such he partakes of experience; but man is also endowed with active reason which distinguishes hi from all other parts of nature. As such he is capable of forming his will in accordance with the insight of his reason.'

Human Reason

It is this recognition of human reason as part of nature which provided that basis for the Stoic conception of the law of nature. The Stoics developed this principle into an ethical one. Reason, according to them, governs the universe in all its parts. Thus man, a part of universal nature, is governed by reason. Reason, it is argued, orders his faculties in such a way that he can fulfill his true nature.

The Stoics popularized the maxim, 'Live according to nature'. This did not necessarily mean 'in primitive simplicity'. 'A thing was in accord with nature when it was governed by its own leading principle, and in the case of man this was reason. The universe itself was governed by a reason similar to that which dwelt in man, and hence he who based on reason could not be hostile to him. The Stoics, popular theory of the unity of life out of the deeper elements of Greek thought.'

The Stoic School of Philosophy was founded by a thinker of Semitic origin by the name of Zeno (350-260 B.C.). Zeno and his followers placed the concept of 'nature' in the centre of their philosophical system. By nature they understood the ruling principle which pervades the whole universe and which, in a pantheistic manner, they identified with God. This ruling principle was of an essentially rational character; to Zeon the whole universe consisted of one substance, and this substance was reason. 'Man as a part of cosmic nature, was an essentially rational creature. In following the dictates of reason, he was conducting his life in accordance with the law of his won nature.

Stoic Philosophers

'Reason, as a universal force pervading the whole cosmos, was considered by the Stoics as the basis of law and justice. Divine reason, they held, dwells in all men everywhere, irrespective of nationality or race. There is one common law of nature, based on reason, which is valid universally throughout the cosmos. Its postulates are binding upon all men in every part of the world. The Stoic Philosophers taught that there should not be different city-states, each distinguished from the rest by its own peculiar system of justice. The developed a cosmopolitan philosophy, founded on the principle of the equality of all men and the universality of natural law. Their ultimate ideal was a world state in which all men would live together harmoniously under the guidance of divine reason. But what is Divine reason in relation to man? As is evident from the above it is none else than human reason itself considered in terms of divine, for it is Good who has given him the intellect, the faculty of reasoning.

Cicero (106-43 B.C.), the great Roman lawyer and statesman, was strongly influenced by the ideas of the Stoic Philosopher. Like them he was inclined to identify nature and reason and to assume that reason was the dominating force in the universe. Here Bodenheimer points out that 'in ascribing 'natural force' to the law, Cicero made it clear that the mind and reason of the intelligent man was the standard by which justice or injustice were to be measured. How far is this correct? Can reason be a standard by which to measure justice and in-justice? Who can be more intelligent than the great philosophers of the past, but no two philosophers agree on a point and each one has his own views of justice.

Destruction of Natural Law

Reason, however exalted, is nothing but a guess a conjecture which can hardly take the place of truth. According to the celebrated statement of David Hume (1711-76) reason is and ought only to be the slave of the passions and can never pretend to any other office than to serve and obey them'. This statement of Hume not only undermined the foundations of natural law but also implied that reason is essentially the slave of human passions which alone inspire human actions. Reason in itself dictates no way of acting but is dictated by passions. The criticism and gradual elimination of the system of natural law culminated in Hume's Treatise on Human Nature, published in 1739-40.

'Kant's Critique of Pure Reason' bears witness to the limitations of reason. Divergence in conceptions of nature and reason has resulted in conflicting theories of natural law. Reason is subject to change and has given turns and twists to natural law. Salmond admits the diverse qualities and aspects of natural law and says: 'Natural law has received many other names expressive of its diverse qualities and aspects. It is Divine Law (Jus divinum)-the Command of God imposed upon men – this aspect of it being recognized in the pantheism of the Stoics, and coming into the forefront of the conception as soon as natural law obtained a place in the philosophical system of Chirstian writers. Natural Law is also the Law of Reason, as being established by the Reason by which the world is governed, and also as being addressed to and received by the rational nature of man. It is also the Unwritten Law (Jus nonscriptum), as being written not on brazen tablets or on pillars of stone, but solely by the finger of nature in the hearts of men. It is also the Universal or Common Law (Jus commune, Jus gentium), as being of universal validity. The same in all places and binding on all peoples, and not one thing at Athens and another at Rome, as are the Civil Laws of states (Jus civile). It is also the Eternal Law (lex aeterna), as having existed from the commencement of the world, uncreated and immutable. Lastly, in modern times we find it termed the Moral Law, as being the expression of the principles of morality'.

Based as it is upon reason, natural law can neither be universal, nor for all time, for reason varies from man to man and place to place. Ihering has already and times as being 'no better than that medical treatment should be te same for all patients'. Societies differ from one another in their from and social character, hence natural law, which is, after all, the product of reason, cannot be applied to them indiscriminately. Future, social facts, in modern society, determine the legal concepts, so the law cannot remain stable.

'Throughout the Middle Ages', says Bertrand Russell in his History of Western Philosophy, 'the law of nature was held to condemn 'usury', i.e. lending money at interest. Church property was almost entirely in land, and landowners have always been borrowers rather than lenders. But when Protestantism arose, its support – especially the support of Calvanism - came chiefly from the rich middle class, who were lenders rather than borrowers. Accordingly first Calvin, then other Protestants, and finally the Catholic Church, sanctioned 'usury'. Thus natural law came to be differently conceived, but no one doubted there being such a case.

Some parts of Locke's natural law, according to Bertrand Russell, are surprising. For example, he says that captives in a just war are slaves by the law of nature. He says also that by nature every man has to punish attacks on himself or his property, even by death. He makes no qualification, so that if I catch a person engaged in petty pilfering, I have apparently by the law of nature a right to shoot him.

The spiritual, social and political revolution which is marked by the Renaissance, the Reformation and the rise of the national state, was bound to create new problems. The absolute rulers, for instance, demanded the legitimating of their claims to omnipotence over their subjects, while the subjects demanded rights to safeguard their interests. The rising commercial middle class, on the other hand, insisted on protection of its rapidly increasing property interests. They all appealed to natural law for justice with the result that natural law could find no way out except to change itself according to the circumstances and act up to the spirit of the times.

Montesquieu (1689-1755), in his Esprit des Lois, held that law, although based on some principles of natural law, must be influenced by environment and conditions such as climate, soil, religion, custom, commerce, etc. With Montesquieu on the one hand and Hume, on the other, the era of natural law as developed from Grotius onwards came to an end.

The history of natural law, as stated by Friedmann, is the search of mankind for absolute justice but, owing to the wrong approach, the search was in vain. Vagrant reason, if made the basis, cannot lead aright, revelation alone is a sure guide to the right path-the path of absolute justice. Now, let us see what positive law connotes.

POSITIVE LAW

What is Positivism?

Positivism, in its modern sense, is a system of philosophy elaborated by Auguste Comte (1789-1857), which recognizes only positive facts and observable phenomena, with the objective relations of these and the laws which determine them, abandoning all inquiry into causes or ultimate origins. Comte, the French Mathematician and Philosopher, distinguished three stages in the evolution of human thinking. The first stage in his system, is the theological stage, in which all phenomena are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things. The third and last stage is the positive stage, which rejects all hypothetical constructions in philosophy and connection of facts under the guidance of methods used in the natural sciences.

As far as the philosophy of law is concerned, the law in the Middle Ages was strongly influenced by theological considerations. The period from the Renaissance to about the middle of the nineteenth century, on the other hand, may be described as the metaphysical era in legal philosophy. The classical law-of-nature doctrine as well as the evolutionary philosophies of law advocated by Savigny, Hegel, and Marx were characterized by certain metaphysical elements. These theories sought to explain the nature of law by reference to certain ideas or ultimate principles.

In the middle of the nineteenth century a movement started against the metaphysical tendencies of the proceeding centuries. This movement may be described as positivism which, as a scientific attitude, rejects a priori speculations and seeks to confine itself to the data of experience.

Beginning with the second half of the nineteenth century, positivism invaded all branches of the social sciences, including legal science. It sought to exclude value considerations from the science of Jurisprudence and the confine the task of this science to an analysis and dissection of positive legal orders. The legal positivist holds that only positive law is law; and by positive law he means those juridical norms which have been established by the authority of positive law he means those juridical norms which have been established by the authority of the state. He also insists on a strict separation of positive law from ethics and social policy, and tends to identify justice with legality, that is, observance of the rules laid down by the state.

In modern legal theory 'positivism' has acquired major significance. Legal positivism has manifested itself in jurisprudence of an analytical type, here designated as analytical positivism. 'Analytical positivism takes as its starting point a given legal order and distils it by a predominantly inductive method certain fundamental notions, concepts, and distinctions, comparing them perhaps with the fundamental notions, concepts, and distinctions of other legal orders in order to ascertain some common elements. In this way it provides the science of law with an anatomy of a legal system: 'The separation, in principle, of the law as it is, and the law as it ought to be.

Austin's Theory of Law (Analytic Positivism)

The work of the English Jurist John Austin (1790-1859) is the most comprehensive and important effort to formulate a system of analytical legal positivism. He defines a law as 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.' Law, as such, is divorced from justice and, instead of being based on ideas of good and had, is based on the power of a superior.

For Austin, the science of jurisprudence is concerned with positive laws, as considered without regard to their goodness or badness. All positive law is derived from a clearly determinable law-giver as Sovereign. And his definition of a sovereign is: 'A determinate human superior, not in a habit of obedience to a like superior and who receives habitual obedience from a given society'. He explains that the superior may be an individual or a body or aggregate of individuals. The sovereign is not himself bound by any legal limitation, whether imposed by superior principles or by his own laws.

The most essential characteristic of positive law, according to Austin's theory, consists in its imperative character. Law is conceived as a command of the Sovereign. Not every type of command, however, was considered a law by Austin. Only general commands, obliging a person or persons to acts or forbearances of a class, merited the attribute of law in his opinion.

'It was not necessary, in Austin's view, that a command qualifying as a law must issue directly from a legislative body of the state, such as Parliament in England. It may proceed from an official organ to which law-making authority has been delegated by the sovereign. Judge-made law, according to Austin, was positive law in the true sense of the term, since the rulers which the judges make derive their legal force from authority given by the states. Such authority the state may have conferred expressly; ordinarily, however, it imparts it by way of acquiescence.

In so far as Austin's theory is based upon the command of the sovereign – the sovereign being the modern state – his teaching was accepted and further developed by the leading German nineteenth century jurists, notably Rudolf von Ihering and George Jellinek. Analytical positivists from Austin onwards greatly influenced legal theory by shifting the emphasis from theories of justice to the national sovereign state as the repository and source of legal power. Kelsen and his followers collectively known as the 'Vienna School' have remarkably restated and developed the analytical positivism of Austin.

Kelsen's Pure Theory of Law

The main object of Hans Kelsen (b. 1881) in his pure theory of law is to divest the science of law of all the ideological elements. Justice, for example, is viewed by Kelsen as an ideological concept. He sees in justice an 'irrational ideal' and the pure theory of law, he maintains, cannot answer the question of what constitutes justice because this question cannot be answered scientifically at all. If justice is to be given any scientific meaningful denotation, it must be identified with legality. Justice in its restricted sense, means 'the maintenance of a positive order by conscientious application of it'.

The Pure Theory of Law, according to Kelsen, is a theory of the positive law. It endeavours to answer the question 'What is law', but not the question 'What law ought to be'. It concerns itself with law exclusively, and seeks to free the science of law from the intrusion of foreign and extraneous sciences, such as Psychology, Sociology, and Ethics. Kelsen admits that law cannot be made the object of sociological research.

Kelsen defines Jurisprudence as 'the knowledge of norms'. By the term 'norm' he understands a hypothetical judgement which declares that the doing or non-doing of a specified act will be followed by a coercive measure of the state. 'Whoever unlawfully appropriates a chattel belonging to another, shall be punished by fine or imprisonment'. In other words, a norm signifies that under certain circumstances the state will exercise compulsion in order to enforce a certain behaviour. The law is a graduated system of such norms of compulsion; it is in its essence 'an external, compulsive order'.

It is the function of legislation to determine the content of general norms and to provide organs and procedure (courts and administrative tribunals) for the execution of these norms. The agent in the process of making norms concrete is the judicial power, exercised by the courts and administrative tribunals. The adjudicating authority decides whether and in what way a general norm is to be applied to a concrete case.

Law, according to Kelsen, is a specific technique of social organization. 'Law is characterized not as an end but as a specific means, as an apparatus of compulsion to which, as such, there adheres no political or ethical value, an apparatus whose value derives rather from some end which transcends the law.' The possibility of natural law is, therefore, categorically denied by Kelsen.

Critics of Kelsen's Theory

Kelsen's Theory, in short, confines itself to the law as it is without regard to its justness or unjustness. But, according to Stammler, absolute purity of any theory of law is impossible. Kelsen, says he, will have to acknowledge defeat when it comes to the question of confliction fundamental norms. The questions, which is the valid fundamental norms, his pure theory cannot avoid, for without it the whole structure would avoid, for without it the whole structure would collapse. From another angle, Lauterpacht, a follower of Kelsen, had questioned whether the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's violent attacks upon natural law ideology.

While the pure theory of law points out the situations which leave a choice between alternative ideologies, such as conflicting interpretations of statutes, it refuses to give any guidance for the solution of such conflicts. Admittedly the law in such cases cannot be interpreted without reference to ideals. Further, the law, according to Austin and Kelsen, is an order backed by threats, that law makes its contribution to social life. It enables individuals to mould their legal relations with others by contracts, wills, marriages and other legal actions.

Critics of Austin's Theory

Austin's characterization of all law as command had been criticized from different quarters. Writers like Bryce, Gray, Dicey and other think that private rights, administrative acts, and declaratory laws cannot be characterized as commands. Further Austin's theory offers no solution in the case of conflicting interpretation of a statute or of a precedent. The rigid separation of law from the ideals of justice has also been attacked by others.

Pragmatic Positivism

As opposed to Austin's theory there is the American Realist movement called Pragmatic Positivism which studies law as it works and functions and not as it is on paper. It is a pragmatic approach to law, that 'of looking towards last things, fruits, consequences'. As remarked by Friedmann, 'the healthy skepticism which, towards the end of nineteenth century, assailed the complacency of analytical jurisprudence took two very different forms. A new legal idealism, bend, set out to fight the assumption of analytical positivism and turned to investigate the realities of modern society in their relation to modern law.

Pragmatic and Analytic Positivisms are poles apart in their concepts of law. To the Analytical Positivists, law is divorced from ethics, while Pragmatic Positivists attach importance to the ethical 'good', but the essence of good, as declared by William James, is simply to satisfy demand. Roscoe Pound (b. 1870), the founder of American Sociological Philosophy is strongly influence by James' pragmatic philosophy, for the thinks of the end of law in terms of a maximum of satisfaction of wants.

Law, according to Pragmatic Positivism, must be determined by social facts which means 'a conception of law in 'flux' and of society which changes faster than the law in 'flux' and of society which changes faster than the law', while Analytic Positivism stands for rigid stability in law. The Pragmatic Positivisit attaches importance to what law 'ought to be', while Austin's theory is only concerned with what law 'is'. These and other differences have rendered Positivism a theory which is self contradictory.

CHAPTER 4

PHILOSOPHY OF LAW

The Supreme End

Legal Philosophy deals with the purpose or end of law and justice is supposed to be the supreme end. Clearly, it is absolute justice which is sought after, hence the efforts of legal philosophy have been, throughout the past and the present, to find out a system of law most suitable to the attainment of absolute justice. The question is, what is justice?

Ideals of justice have been formulated by legal thinkers in different ways and we find may diverse and discrepant theories, each claiming absolute validity. Which of these is to be accepted? Can we discover any standard to judge their correctness?

Ideal of Justice

Let us first consider the most famous theories of justice, enunciated by Plato and Aristotle. Plato, in his Republic, fashioned a doctrine of the just comman wealth imbued with collectivistic ideals. In his view, justice consists in a harmonious relation between the various parts of the social organism. Every citizen must do his duty in his appointed place and do the thing for which his nature is best suited. Since Plato's state is a class state, Platonic justice signifies that the members of each class must attend to their own business and not meddle with the business of the member of the other class. The rulers of the state must see to it that each person is assigned his proper station in life, and that he properly performs the duties of his station. The idea underlying this concept of justice rests on the assumption that an individual is not an isolated self, free to do whatever he likes, but a dependent member of a universal order who must subordinate his personal wishes and preferences to the organic unity of the collective whole.

Aristotle thinks of justice in a different way. Justice, in his opinion, consists in a sort of equality, and demands that the things of this world be equitably distributed and that such distribution be maintained by the law. According to this twofold function of justice, Aristotle distinguishes between two forms of justice. The first he calls distributive and the second corrective. While the first is meted out by the legislator, and consists in the distribution of offices, rights, honors, and goods to the members of the community according to the principle of proportionate equality, the second guarantees, protects, and maintains this distribution against illegal attacks. The corrective function of justice is chiefly administered by the judge and re-establishes the status quo by returning to the victim that which belonged to him or by compensating him for his loss.

Herbert Spencer has taken a fundamentally divergent attitude toward justice. The supreme value the attached to the idea of justice was not equality but freedom. His famous formula is: 'Every man is free to which he will, provided he infringes not the equal freedom of any other man. Kant has taken a similar view in using the concept of liberty for the purpose of defining the meaning of law and justice. He described law as 'the totality of the conditions under which the arbitrary will of one can coexist with the arbitrary will of another under a general law of freedom.

W.R. Sorley, a Scottish philosopher, claimed that no satisfactory theory of justice could be developed without finding a place for both equality and freedom in the scheme of societal organization. The Roman Jurist Ulpain defined justice as 'the constant and perpetual will to render to everyone that to which he is entitled'. Similarly, Cicero described justice as the disposition of the mind to render to everyone his due. St. Thomas Aquinas observed that justice was 'a habit whereby a man renders to each one his due by a constant and perpetual will.

In short, 'justice demands that freedom, equality, and other basic rights be accorded and secured to human beings to the greatest extent consistent with the common good. But the common good is not defined and, at the same time, it is asserted that 'justice has its dynamic and fluid components, it does not permit us to adopt stereotyped solutions for our social problems regardless of time, state of social evolution, development of productive forces, and other contingent factors. Thus justice is always changing.

Basic Types of Justice

Kelsen has attempted to reduce the many theories of justice to two basic types; a rationalistic and a metaphysical one, the former being represented by Aristotle and the latter by Plato. He describes the rationalistic type s the one which tries to answer the questions of justice by defining it in a scientific or quasi-scientific way-in a way based on reason. The metaphysical type, on the other hand, is the one realization of which is shifted to another world beyond human experience. For Kelsen, justice cannot be defined, it is an irrational ideal.

'The different schools of neo-Kantian philosophers have realised the relativity of justice and the dualism between eternal justice and positive law. They thave, therefore, divorced the idea of justice. What emerges from all these varying attempts is the failure to establish absolute standards of justice except on a religious basis.

Social Control

Absolute justice, thus, appears to be unattainable, but the professed aim of legal philosophy, says Roscoe Pound, is to give us a complete and final picture of social control and to lay down a moral and legal and political chart for all time. He, thus, refers to 'perfect law' by which human relations might be ordered for ever without uncertainty and freed from need of change. The question is: What is it that makes law perfect? Is establishment of order alone enough?

For Latin American legal philosopher, Louis Reasons Siches, certainty and security constitute the primary and immediate aim of the law, its ‘basic motivation’; justice, on the other hand, should be sought after by the law-makers as a more remote end. Says he: ‘Law was not born into human life by reason of the desire to render tribute or homage to the idea of justice, but to fulfill an instable urgency for security and certainty in social life. The question of why and wherefore men make Law is not answered in the structure of the idea of justice but in a subordinate value security corresponding to human need’.[9]

There is serious doubt’, says Bodenheim, whether a social system fulfilling the requirements of order and legal certainty can be effective without the presence of a substantial ingredient of justice. If the feelings of fairness of a large part of the population are outraged by a system of law purporting to establish ‘orderly’ conditions of life, if will be extremely difficult for the public authorities to maintain such a legal system against attempts at evasion or subversion. Men will not stand long for an order they feel to be totally unreasonable and unbearable, and a government bent on perpetuating such an order will run into serious difficulties of enforcement. Thus an order which does not have a substantial anchorage in justice will rest on an unsafe and precarious basis. As John Dickinson points out: ‘We come upon the need for not merely a system of fixed general rules, but of rules based on justice, or in other words, on a regard for certain demands and capacities of human nature. Otherwise the system would not be workable; offending ingrained proclivities and standards of judgment, it will be continually violated and so fail to yield the certainty which is the excuse for its existence.

'We turn next to the question of whether a system of law would be feasible which dispenses entirely with ordered regularity and certainty and concentrates its efforts solely on administering an individualized justice to the members of the community. The answer to the question must be that such systems which abandons any and all standards of judgment and relies solely on the free and unfettered intelligence of its judges will, by its very nature, fall. Order and regularity are in another and equally significant sense essential to the accomplishment of justice.'[10]

According to Pound, 'two needs have determined philosophical thinking about law. On the one hand, the paramount social interest in the general security, which as an interest in peace an order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human action which should restrain magisterial as well as individual willfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making continual new compromises because of continual changes in society have called ever for readjustment at least of the details of the social order. They have called continually for overhauling of legal precepts and refitting them to unexpected situation. These principles of change and growth, however, might easily prove inimical to the general security, and it was important to reconcile or unity them with the idea of a fixed basis of the legal order.'[11]

Perfect Law

Thus, the task undertaken by the philosophers, was, no doubt, very difficult, for, in order to make perfect law, they had to take into consideration all the above requirements of law. Pound, in his Introduction to the Philosophy of Law, observes that what was needed, in such a difficult situation, was some theory of the authority of law which should impose bonds of reason upon those who enacted, upon those who applied, and upon those who were subject to law'.[12] The perfect law, therefore, had to combine in itself the attributes of what it ought to be.

Thus, according to Pound, the Jurists came to the doctrine of the 'ratio', the principle of natural law behind the legal rule. Natural law was considered to be the higher and ideal law, the apparatus by which rules were to be measured, by which new rules were to be framed, and by which old rules were to be extended or restricted. But the natural law could not stand upon its own which resulted in the defeat of Legal philosophy.

Defeat of Legal Philosophy

It is interesting to note that Pound marks the events, in the sixteenth century, which gave a new turn to natural law with the result that natural law was interpreted in different terms according to the social change and lost its ideal character of a higher law. Says he:

'On the breakdown of the feudal social organization, the rise of commerce and the era of discovery, colonization, and exploitations of the natural resources of new continents, together with the rise of nations in place of loose congeries of vassal-held territories, called for a national law unified within the national domain. Starkey proposed codification to Henry VIII and Desmoulins urged harmonizing and unifying of French customary law with eventual codification. The Protestant jurist theologians of the sixteenth century found a philosophical basis for satisfying these desires of the time in the divinely ordained state and in a natural law divorced from theology and resting solely upon reason, reflecting the boundless faith in reason which came with the Renaissance. Thus each national jurist might work out his own interpretation of natural law by dint of his own reason, as each Christian might interpret the word of God for himself as his own reason and conscience showed the way. On the other hand, the Catholic Jurists of the Counter-Reformation found a philosophical basis for satisfying these same desires in a conception of natural law as a system of limitations on human action expressing the nature of man, that is, the ideal of man as a rational creature, and of positive law as an ideal system expressing the nature of a unified state'. [18]

Here the legal philosophy, with reason as its basis, crumbles, for natural law is interpreted by each jurist according to his own reason and reason varies from man to man and place to place.

Hume has supplied a penetrating logical analysis which destroys all the pretensions of natural law to scientific validity.[14] The theory of natural law was based upon a conception of reason as a faculty inherent in all men and producing certain immutable norms of conduct. Hume made it clear that 'reason' as understood in the system of natural law confused three different things:

Inevitable and necessary truths, of which there are very few, such as certain mathematical axioms. They do not exist in the realm of human behavior.

Relations between facts or events which are normally described by 'cause and effect' because they are usually associated in a particular way, as a meter of experience and observation. But there is no logical necessity in such association; it is merely a matter of empirical correlation and the observation of these correlations is the object of empirical science.

'Reasonable' human conduct. Natural law theories assume that there are national principles of behaviors which are as such of universal and necessary validity.[15]

The above analysis shows that the conception or reason, on which the theory of natural law is based, is but a confusion of the three factors that are quite different in their meaning. Hume, therefore, rejects reason. For him, reason is merely imaginary and fictitious.

Legal Philosophy, with its aim of absolute justice, relied upon natural law which could not last long as reason, which is ever changing, formed its basis. Further, justice itself was of a fluid character and could not yield to a precise definition. Both these factors contributed to the defeat of Legal Philosophy, though it struggled hard to achieve its professed aim. This marks the difference between reason and revelation has been a perpetual source of justice and is, in fact, absolute justice, for God alone knows what is absolutely good and just for mankind. Islam, therefore, approaches justice in the manner prescribed by God and according to the light provided by revelation, for the notion of justice neither changes nor varies but remains everlasting under revelation.

CHAPTER 5

DISTINCTIVE FEATURES OF ISLAMIC LAW

(a) Islamic Law is the Command of Allah.

Islamic Law, or the shariah, is the command of Allah revealed to the Prophet Muhammad (peace and blessings of Allah be upon him). It is the only divinely-ordained system preceding the Islamic state and not preceded by it, controlling the Islamic society and not controlled by it.

God alone is the sovereign of Islamic State and in Him vests the supreme controlling power, and absolute and independent authority of State. The opening chapter of the Qur'an, rightly called the essence of the Book, gives us the attributes of God. Praise is to God, Lord of the World'[32] are the words whereby God is firstly the Rabb or Lord of the Worlds. The Arabic word *Rabb* is usually translated as Lord but it is a poor substitute for the word Rabb which signifies not only the Sovereign but also the Sustainer and Cherisher of the worlds.

His Sovereignty is repeatedly asserted in the Qur'an: The Command is for none but God's[33]; And none can command except God'[34]; 'He is the best to command'[35]; 'His is the Sovereignty of the Heavens and the Earth'; Blessed is He in Whose Hands is the Sovereignty and He over all things has power.[36]

(b) Sovereignty

Sovereignty' is derived from the Latin word 'supernuus' i.e., supreme. This word is used, in Modern Political Science, to signify absolute authority. Bodin was the first to develop the concept of sovereignty. For him, sovereignty means a perpetual, humanly unlimited, and unconditional right to make, interpret, and execute law. The existence of such a right, according to him, is unncessary for any well-ordered state. The Grotius, sovereignty is the supreme political power in him whose acts are not subject to any other and whose will cannot be overridden. Burges defines it as 'original, absolute, unlimited power' over the individual subject and overall associations of subjects. From what has been written by Bryce, Laski and others, the attributes of sovereignty are: 'permanance, all comprehensiveness, indivisibility, exclusiveness and absoluteness.' Austin has defined it thus : 'If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society, political and independent'.

---

[32] 1:2.

[33] 12:40.

[34] 12:67.

[35] 12:80

[36] 57:5.

The Sovereign of Austin is of a given society, while God is the Sovereign of the whole universe and all mankind. 'God's Sovereignty is much superior to the above definition of Austin and to all definitions that the Modern Political Science can think of. No word other than 'Rabb' can encompass the meaning of God's Sovereignty. He is at once a Sovereign, Sustainer, cherisher, Nourished, Regulator, Regulator, and Perfecto. He alone is the Creator and the real Ruler of this universe: Verily His is the Creation and His is the Command. And those who do not make their decisions in accordance with that revealed by God, are (in fact) the unjust. He cannot be compared to the Sovereigns of the World, nor is the Islamic state similar to a democracy wherein sovereignty vests in the people. It is a state ruled by Devine laws which precede it and to whose dictates it has ideally to conform.

According to Austin, law is the command of the sovereign and he defines law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Law is thus strictly divorced form justice and instead of being based on ideas of good and bad, is based on the power of a superior. Austin’s law, as such may be the command of a tyrant, but god is not a tyrant. The Command of God, as the supreme Sovereign, is no doubt, a positive law but it is not bereft of Justice, for God is most Merciful, Most gracious and extremely just. He alone knows what is really good for humanity and his just laws ensure the welfare of all.

The term law, according to Austin, is applied only to such rules as are enforced by the coercive power of the sovereign. Obviously, it is a view to rigid, for the intrinsic value of law lies in its notion of justice and morality and in its applicability to the entire scheme of life. Austin’s positive law is, there fore, of a limited scope, while the law of God is all embracing and universal.

Life, in Islam, is treated as an organic whole, all its parts to be governed by Islamic law, hence the conception: 'Render unto Caesar the things that are Caesar's, and render unto God the things that are God's has no applicability to Islam. Islam is a universal religion, so are its laws.

Further, God being Merciful. His law cannot be entirely coercive. It is partly coercive and mainly corrective and persuasive. It allows time for penitence and for amendments in life. Only such crimes as are of grave nature, for example, murder, physical injury, adultery, fornication, theft, highway robbery, and wine drinking are severely punished to maintain peace and order in society.

(c) Ideal Law (Perfect and for all times)

God is the Perfect Being, so is His law and cannot be otherwise, for in tat case it would be ascribing defectiveness to God which is impossible. He is Omnipotent, Omniscient and omnipresent, hence His law is all-pervading and comprehensive. He is the first, and the last, He is the manifest and the immanent and is the knower of all things, His law is, therefore, universal and for all time, particularly because it takes into its sweep not only this world but also the Next.

Divine law has combined in itself, not only what law 'is' but also what Law 'ought to' be. It is, in short, the is, and the ought to' of law and, thus, positive as well as idea, and may aptly be described as 'The Positive Law in Ideal From'.

Charles Gide and Charles rest speak of Divine Law in the following terms:

'We may say that the 'natural order' was that order which seemed obviously the best, not to any individual whomsoever, but to rational, cultural, and liberal minded men. It was not the revelation of the principle within. This order was supernatural and so raised above the contingenices of every day immutability. It remained the same for all times, and for all men. Its fiat was unique, eternal, it was universal in scope.'[37]

Jackson's View :

'Islamic law finds its chief source in the will of Allah as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated location. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the Qur'an, which leaves little room for additional legislation, criticism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the Qur'an lays down rules of behavior toward others and toward society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at peril of his future life'.[38]

---

[37] Gide and Rest A History of Ecomnic Doctrines P.20

Gibb's View:

At the root of all Islamic political concepts lies the doctrine of the *ummah*, the Community of Muslims. In its internal aspect, the *ummah* consists of the totality (jama'ah) of individuals bound to one another by ties, not of kinship or race, but of religion, in that all its members profess their belief in the One Allah, and in all their relation to Him, all are equal, without distinction of rank, class, or race. Differences of function are recognized, but the noblest among you is the most God-fearing' (Qura'n 49:13) In its external aspect, the *umma* is sharply differentiated from all other social organizations. Its duty is to bar witness to Allah in all the relations to its members with one another and with all mankind. They form a single indivisible organization, charged to uphold the True Faith, to instruct men in the way of God, to persuade them to the good and to dissuade them from evil by word and deed.

The Head of the *umma* is Allah and Allah alone. His rule is immediate, and His commands, as revealed to Muhammad, embody the Law and Constitution of the *ummah*. Since God is Himself the sole Legislator, there can be no room in Islamic political theory for Legislation or legislative powers, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no 'sovereign state' in the sense that one state has the right of enacting its own law, though it may have some freedom in determining constitutional structure. The law precedes the state, both logically and in terms of time; and the state exists for the sole purpose of maintaining and enforcing the law.[39]

Islamic law may be best understood against its pre-Islamic background.

---

[38] Foreword to 'Law in the Middle East, PP. 7,8

[39] Gibb Constitutional Organization in 'Law in the Middle East P.3

(d) Pre-Islamic Background

In the pre-Islamic period the unit of society was the tribe, the kinship group who claimed its descent from a common ancestor. It was to the tribe as a whole that the individual owed allegiance and it was from the tribe as a whole that he obtained the protection of his person and property. The nomadic Arabs were kept down in stagnation and consequently had to rely upon the customs which grew amongst them as a result of frequent repetition of certain acts by great number acting in concert or, at least, acting in the same way when face to face with the same need'. These customs were handed down to posterity by way of tradition which had a sacred character in the social life of the pagan Arabs. Their rituals were not performed out of religious feeling but as traditional customs inherited from their ancestors'. As Coulson observes, 'the tribe was bound by the body of unwritten rules which had evolved along with a historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal Shaikh nor any representative assembly had legislative power to interfere with this system'. The law of family relationship and inheritance and the whole of penal law, as stated by Shacht, was dominated by the ancient Arabian tribal system. This system implied the absence of legal protection for the individual outside his tribe, the absence of a developed concept of criminal justice and the subsumption of crimes under torts, the responsibility of the tribal group for the actions of its members and therefore unlimited vengeance of its members and therefore unlimited vengeance for homicide, mitigated by wergild (blood money).[40]

'In the absence of any legislative authority', says Coulson, 'there did not exist any official organization for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal pride usually demanded that intertribal disputes be settled by force of arms, while within the tribe recourse would usually be had to arbitration. But again this function was not exercised by approved officials. A suitable ad hoc arbitrator (*hakam*) was chosen by the parties to the dispute, a popular choice being the Kahin, a priest of pagan cult who claimed supernatural power of divination'.[41]

The settled communities of Makkah had a commercial law and those of Madina a law of land tenure. Makkah, the birth place of the Prophet was a trade centre and, according to Limens, a paradise of stock brokers of middle men and of bankers. In Makkah there seems to have existed a system of legal administration as the public offices were divided among twelve principal tribes and oaths formed an important part of the procedure in deciding cases.

---

[40] Coulson, A History of Islamic Law, P.9

[41] Ibid P.10

Makkah had commercial relations with South Arabia, Byzantine, Syria and Sassanian Iraq while Madina was the chief town of agriculture. 'The customary commercial law of Makkah was enforced by the traders among them in much the same way as was the Law Merchant in Europe. There are some traces of agricultural contracts, which may be postulated for Madina, too. It must not be assumed, however, that the outline of the Islamic law of property, contracts, and obligation formed already part of the customary law of the pre-Islamic Arabs; the reasoning on which this assumption was based has been invalidated by more recent research into the history of Islamic Law'.

At the advent of Islam the relations of the sexes and the status of children were uncertain. Along with a regular form of marriage there existed loose unions and an Arab was permitted to take as his wife his step-mother, cousin, and wife's sisters and was free to release himself from the marital tie. He had an absolute power to divorce and to revoke, such divorce as and when he chose to do so. Adoption was in vogue. The right to adopt was not restricted by any condition as to the age of the adopted child, or the absence of a natural born son to the adoptive father. Female infanticide was a common feature and slavery a recognized institution.

Loans were advanced on interest, usury under the name of the '*riba*' was rampant, testamentary dispositions of property were unrestricted. On the death of an Arab his property devolved on his male heirs capable of bearing arms, all females and minors being excluded.

(e) Reforms

Islam was a revolution in that it abolished the group system based on blood ties and replaced it by the community of Faith in the One God. All abominable customs were discarded and man was reckoned as an individual with his rights and obligations. Pride of nobility and the arrogance of the times of Ignorance or Jahiliyya dwindled into insignificance as the Prophet declared that all men are equal and no one is superior to another except in point of righteousness.

Society was moulded according to the Divine law. The basic concepts of civilized society such as compassion for the weaker, fairness in dealings, incorruptibility in the administration of justice were enjoined upon man. Intoxicants, *riba* (interest or usury), gambling and such like were forbidden. Human life was purged of all its vices and virtues prevailed. Status of women was raised and rules of inheritance laid down. All this was possible, for the function Divine law is to build the society on virtues and to raise, for this purpose, a band of Salihin' or the righteous who enjoin right conduct and forbid indecency.

Virtue and vice, good and evil cannot be rationally determined, for God alone knows what is absolutely good or absolutely evil. To know the objectives of good are beyond our power and this cannot be denied, for it is often that we like a thing which is bad for us and hate a thing which is good for us; 'It may be that you dislike a thing which is good for you and perchance ye love a thing which is bad for you.

Man cannot know where the real good lies and in order to properly guide him human actions are classified into five categories; (1) Obligatory (fard), (2) Prohibited (haram), (3) reprehensible (makruh), (4) recommended (mubah). Obligatory is the demand which requires men to do something, while forbidden is the command to abstain from doing something. When the demand is not of an absolute character, the act to which it refers, if it be one of commission, is called recommended or recommendable if it be one to be forborne or abstained from, it is called 'reprehensible'. An act with reference to the doing or omission of which there is no demand or, in other words, with respect to which the law-giver is in different, is regarded as permissible. All acts which are neither obligatory, nor forbidden, nor recommended, nor condemned fall within the last category.

The same is, more or less, reflected in transactions: (1) Valid (*sahih*) if both its nature (*asl*) and its circumstances (*wasf*) correspond with the law, (2) reprehensible (*makruh*) if its *asl* and *wasf* correspond with the law, but something forbidden is connected with it, (3) defective (fasid) if its *asl* corresponds with the law but not its wasf, (4) invalid (batil) null and void.

This is how human beings are guided aright. With its particular norms of morality, Divine Law lays down universal rules of human conduct. Divine law, as specified above, is perfect and pure, universal and for all times. This is the ideal form which the Rightly-guided Caliphs endeavored to preserve, for otherwise the whole edifice of Islam would have fallen to pieces. At this stage a historical sketch will be use full to know the stages, the law passed through.

Islamic Shari'ah : A Universal Law

It is a necessary part of Islamic knowledge that the Shari'ah came as a universal law requiring the adherence of all human beings. Since it is the last revealed law, it is inevitably applicable to the whole of humankind everywhere on earth until the end of the world. The supporting evidence is so abundant in the Qur'an and the Sunnah that it amounts to thematic recurrence *(tawatur ma'nawi)* yielding certainty. Thus for example, Allah says, "Now [as for you, O Muhammad,] We have not sent you otherwise than to mankind at large" (34:28), "Say [O Muhammad]: 'O mankind! Verily, I am an Apostle to all of you'" (7:158). In an authentic Tradition, the Prophet is reported to have said: "I have been given five things no one before me was given", and he counted among them: "An apostle used to be sent specifically to his own people, while I have been sent to all of mankind."[42] Accordingly, the universality of the Shari'ah does not need to be elaborated upon here, for our purpose is not to prove it for those who reject it, but to rather deal with what follows from it.

Since Allah willed by His fathomless wisdom that Islam be the last religion revealed to humankind, it was necessary that it should be grounded in a universal attribute shared by all human beings, which is rooted in their psyche, and with which their sound minds are familiar, namely, the attribute of *fitrah*. In this way, the injunctions and rules (ahkan:) of the shari'ah would be accepted happily and eagerly by thinking people who understand their meaning and their purpose and therefore always sbmits to them without question. In other words, his arrangement allows the more highly educated individuals to extend the established general principles of the Shari'ah and work out its details, while those who are less educated will also accept it willingly and obey its commands.

Since it was not possible that the transmitter of the Shariah be a group of apostles from the different races and tribes of humankind – for such plurality would impede good management – Allah chose to send Prophet from amongst the Arabs, an individual of the human race itself, as He says in the Qur'an:

> Yet whenever [Allah's] guidance came to them [through a prophet,] nothing as ever kept people from believing [in him] save their objection: "Would Allah have sent a [mere] mortal man as His apostle?" Say: "If angels were walking about on earth as their natural abode, We would indeed have sent down to them an angel out of heaven as Our apostle."[43]

Indeed, there is a fathomless wisdom in Allah's choice of a man from among the Arabs to convey the message of Islam. It is not our purpose here to explain in detail those aspects which we have been able to discern, and Allah says in this respect:

---

[42] See the complete text of the Tradition in Bukhari, Sabib, 'Tayammum', hadith 335, p.58; Darimi, Sunan, ed. Fawwaz Ahmad Zamarli et al. (Beirut: Dar al-Rayyan & Dar al-Kitab al-Arabi, 1407/1987), 'Siyar', hadith 2467, vol. 2, p.244.

[43] Al-Qura'n 17:94-95.

"[But] Allah knows best upon whom to bestow His massage."[44]

Nevertheless, we would like to say the following:

Since the Prophet was from the Arabs, it was necessary that he should speak the Arabic tongue. This required that the Arabs be the first ones to received the Shari'ah from him. Likewise, the Arabs were the transmitters of the Islamic Shari'ah to all those to whom it is addressed, including their own selves. Allah chose them for his mission because, at the time of the Qur'anic revelation, they were distinguished by four characteristics that had never in history been combined in a single nation. These characteristics consisted of fine minds. strong memories, simplicity and naturalness of civilization and legislations, and aloofness from association with other nations of the word.

Their fine minds enable them to understand the message of Islam and grasp its teachings. while their strong memories meant that they were qualified to preserve it and not become confused in transmitting it. The simpleness of Arab society made them open to absorbing its teachings easily, for they were the closest to the original human nature *(fitrah)* and were not followers of any well-established religious law which they would firmly uphold.[45] Finally, their isolation meant that the Arabs were prepared to mix and associate openly with other nations with whom they had no hostilities. In contrast to the Persians in relation to the Byzantines and the Copts in relation to the Israelites, their hostilities were only among their tribes. Yet, no importance should be attached to the battles that broke out between Arab tribes and the Persians and Byzantines such as that of Dhi Qar and Halimah, [46] for they were rare incidents. Moreover, in such incidents, the

---

[44] Al-Qura'n 6:124.

[45] It was for this reason that Arab Christians were most reluctant to accept Islam, for they saw themselves as the followers of the right religion. For the same reason, the Jews in Madinah resolutely stuck to their religion except for very few individuals who embraced Islam.–Author.

[46] Dhi Qar, also know as Yawm Quraqir, Yawn al-Jibayat, Yawm Dhat al-'Ajram, and Yawm Batha' Dhi Qar, was one of the fiercest battles between the Arabs and Persians in the pre-Islamic period. I was fought by a well, known as Dhi Qar, Which belonged to the Bakr ibn wa'il tribe, not far from the present location of the city of Kufah. This battle took place during the reign over the Lalkmid kingdom of Hirah (southern Iraq and northern Arabia) by Iyyas ibn Qubaysah ibn Abi 'Afra ibn al-Nu'man ibn Hayyah al-Ta'I (605-614AC), an Arab client-King of Persia, between the Arabs and the Persians. The immediate reson for this battle is said to have been the claim made by Chosroe for the possessions of al-Nu'man ibn al-Mundhir, whom he had killed. Since the people of Bakr ibn Wa'il, to whom al-Numan's possessions had been entrusted, rejected the claim, Chosroe sent a huge army to punish the rebellious tribe and extract the claimed possessions. This provoked other Arab tribes and the battle turned out to be a serious defeat for the Persian imperial army and a resounding victory for the Arabs.

Yawm Halimah refers to the battle that took place in 554 AC between the Lakhmid king al-Mundhir (Greek: Almndarus) ibn Ma'al-Sama' and the Ghassanid king of Syria al-

Arabs were actually fighting on behalf of either the Persians or Byzantines, and thus the hostilities of those for whom they were directly fighting overshadowed their own hostilities with these two nations.

One of the most important aspects of the universality of the Shari'ah is that its rules and commands should apply equally to all human beings as much as possible, because uniformity in this area is crucial for the realization of social unity of the community. Thanks to this wisdom and particularity, Allah based the Shari'ah on a inner wisdom *(bikam)* and underlying causes *('ilal)* that can be perceived by the mind and which do not change according to nation and custom. Accordingly, scholars of Islam in every era have agreed, except some whose disagreement is insignificant, that it is the duty of the scholars of the community to consider the purposes of the commands and rules of the Shari'ah and to derive ruling from them. To support their position, they have cited the following two verses: "Remain, then, conscious of Allah as best as you can" (64:16); "Learn a lesson *(I'tabiru)*, then, O you who are endowed with insight" (59:2). These are, however, mere rhetorical proofs. therefore, we would rather adhere in this respect in this respect to consensus and to the established practice of the Companions and scholars of the community throughout the ages.

This universality of the Shari'ah has been expressed in many verses of the Qur'an, such as "Allah wills that you shall have ease, and does not will you to suffer hardship" (2:185), "and Allah does not love corruption" (2:205), "We bestowed Revelation from on high, and [thus gave you] a balance [on which to weigh right and wrong,] so that men might behave with equity" (57:25); "for, in [the law of] just retribution, O you who are endowed with insight, there is life for you, so you might remain conscious of Allah" (2:179). In the Prophetic Traditions, it has been expressed as general rules such as the Prophet's Sayings: "No doubt! Your blood, your properties, and your honor are inviolable to one another like the sanctity of this day of yours, in this (sacred) town (Makkah) of yours, in this month of yours;"[47] "If large amount of anything causes intoxication, a small

---

Harith (Greek:Arethas) ibn Jabalah (also known as al-Harith ibn Abi Shammar), a vassal king of the Byzantine empire. According to al-Kalbi, it is called the Day of Halimah because when al-Harith ibn Abi Shammar was training the army he sent to fight al-Mundhir, Halimah, the daughter of al-Harith, perfumed all the soldiers and provided them with winding-sheets. However, a stronger view upheld by annalists (like Abu 'Ubaydah Ma'mar ibn al-Muthanna [d.209 AH]) and historians (like Ibn al-Athir) is that the name Halimah rather refers to a place that is also known as Dhat al-Hiyar.

Since the Lkhmids were allied to the Persians and the Ghassanids were the allies of the Byzantines, the Battle of Halimah can be seen as a war by proxy between the two great empires, as pointed out by the author.

[47] Bukhari, *Sahih,* 'Ilm', hadith 105, pp.23-24; 'Haji', hadiths 1739-1742, pp.280-281; 'Maghazi', hadith 4406, p.747; 'Hudud', hadith 6785, p.1170; 'Fitan', hadith 7078, pp.1219-1220; 'Tawhid', hadith 7447, p.1283; Muslim, *Sahib,* 'Qasamah', hadith 1679, pp.663-664; Darimi, *Sunan,* 'Manasik', hadith 1916, vol. 2, p.92. It is also in Tirmidhi *(Tafsir al-Qur'an)* and Ibn Majah *(Manasik and Fitan).*

amount of it is also prohibited;"[48] and "There is no injury nor return of injury." Similarly, most of the ambiguous *(mujmalat)* and unrestricted *(mutlaqat)* expressions in the Qur'an are intended to convey the general and absolute meanings. However, jurists gave themselves unnecessary trouble by seeking to clarify the ambiguous and qualify the unrestricted by interpreting what is unrestricted in one place in terms of what is qualified in another, even though they might not belong to the same category. For this purpose, they developed a number of methods.[49]

This happened even during the time of the companions. When he was in Kufah, 'Abd Allah ibn Mas'ud understood that the Qur'anic statement "and the mothers of your wives" (4: 23) meant that contracting a marriage with the mother does not make her daughter forbidden unless the husband has consummated the marriage with the mother. Ibn Mas'ud understood this absolute phrase in this way by referring it to the following qualified expression in the same verse: "and your step-daughters – who are you foster-children- born of your wives with whom you have consummated your marriage; but if you have not consummated you marriage, you will incur no sin [by marrying their daughters]" (4:23). When he returned to Madinah, he was informed that the established tradition was to interpret the phrase "and the mothers of your wives" in its absolute meaning without any restriction or qualification. It is indeed surprising that scholars of usul *al-fiqh* elaborated on interpreting unrestricted statements as qualified ones, though the rule is that the generalization of a *hukm* should be restricted to its genus. The legislative rules (tashri'at) covering the particulars of individual cases are equally open to generalization and particularization. Perhaps it was for this type of rule that the Prophet forbade the people to write down, when he said: "Do not take down anything from me, and anyone who has taken down anything from me, except the Qur'an, should efface it, "7[50] lest particular cases be taken as universal rules.

Therefore, the Companions needed special permission from the Prophet when Abu Shah wanted them to write down for him what the Prophet had said concerning the boundaries of the Makkan sanctuary *(Haram)*. Then, he told them: "Write it for Abu Shah."[51] That is why we find much disagreement amongst the scholars over juristic argument relying on particular cases and isolated reports when they contradict the general rules, that is, literal universals (*kulliyyat lafziyyah*) and inductive thematic universal *(kulliyyat ma'nawiyyah)*, or with *qiyas,* or with the established practice of the people of Madinah (*amal abl al-Madinah*), according to well-known doctrines in *usul al-fiqh*.[52]

---

[48] Abu Dawud, *Sunan,* 'Ashribah', hadith 3681, vol.2/3, p.327; Nasa'I, *Sunan,* 'Ashribah', hadith 5607, vol. IV/8, p.300; Tirmidhi, *Sunnan,* 'Ashribah' ,hadith 1865, vol. 2/4, p.292.

[49] For a comprehensive discussion of the problems of unqualified words and qualified words and statements and the ways of solving them, see Muhammad Fathi al- Durayni, *al-Manabij al-Usuliyyab fi al-Ijtibad bi al-Ra'y fi al-Tashri al-Islami* (Beirut: Mu'assassat al-Risalah, 1418/1997),pp.519-543.

[50] Muslim, *Sahih,* 'Zuhd', hadith 3004,p.1145.

[51] Bukhari, *Sahib,* 'Ilm', hadith 112,24; 'Luqatah', hadith 2434,pp.391-392; 'Diyat', hadith 6880, p.1185; Muslim, *Sabib,* 'Hajj, hadith 1355, p.506.

Accordingly, giving a special consideration to the mores and customs of different peoples refutes claims of a binding and universal legislation. This objective is accommodated in the legislative default of permissibility, on the basis of which each human group can enjoy living according to its customs. Nevertheless, since the basis of permissibility is that what is permissible does not contain an indispensable or a *mafsadah* that is considerable for its followers, then they must be subsumed under the universal legislative rules of obligation or prohibition.

Therefore, we find that Islamic legislation did not concern itself with determining what kinds of dress, house, or mount people should use. For example, it did not require people to ride camels when travelling, nor did it prevent the people of Egypt and Iraq from riding donkeys, or the people of India and the Turks from using bullocks as means of transportation. This is why Muslims have not need any evidence allowing them to use wheels, arts, or trains. The same principles apply to the different kinds of food that do not contain anything unlawful, so that only someone who is ignorant of their composition or unaware of the methodology of Islamic legislation will ask about these matters.

Accordingly, we can ascertain that no one has the right to impose the customs and mores of a particular people on them or on other people as 'legislation'. Of course, Islamic legislation takes into account such customs and mores so long as their followers have not altered them. This is because people's adherence to those customs and mores and the latter's continuance as part of their lives endow them with the status of default of terms and conditions (*shurut*) between them. Likewise, when, in their transactions, nothing different is stipulated, people are then bound by their customs and mores.

This is what Malik ibn Anas meant when he maintained that a husband cannot force his wife, who is an [Arabic] woman of high lineages, to breastfeed her child, if this is accepted as an established custom among her people, thus enjoying the status of terms and conditions. He understood Allah's saying: "And the mothers may nurse their children for two whole years" (2:233) to be applicable to women who do not enjoy this status, or to determine the period of nursing, though not to make nursing itself obligatory.[53]

---

[52] See a detailed discussion and exposition of issues of solitary reports *(akhbar ahad)* by al-Layth ibn Sa'd in a long letter to Malik ibn Anas, cited verbatim in Ibn Qayyaim al-Jawziyyah, *I 'lam Muwaqqiin an Rabb al- Almin,* ed. Muhammad Ab al-Salam Ibrahim (Beirut: Dar al-'Ilmiyyah,1411/1991), vol. 2/3, pp. 69-73. See also, al-Imam Muhammad ibn Idris al-Shafi, *al-Risalah fi Usul al-Fiqh*, trans. Majid Khadduri (Cambridge, UK: The Islamic Texts Society, 1997), pp.246-284; Bernard G. Weiss, *The Search for Allah's Law: Islamic Jurisprudence in the Writings of Saif al-Din al-Amidi* (Salt Lake City, UT: Univesity of Utah Press, 1992), pp.291-328.

[53] For an exposition of Malik's view on this issue, see Abu Bakr Muhammad ibn 'Abd Allah ibn al-Arabi, Ahkam al-Qur'an, ed. Ali Muhammad Bijawi (Beirut : Dar al-Jil, 1407/1987), vol.I,p.206.

This method of interpreting customs and mores has removed much confusion and many perplexing difficulties that faced the scholars in understanding the reasons why the Shari'ah prohibited many practices in which no aspect of *mafsadah* could be perceived. One example of this is the prohibition for woman to add hair extensions *(wasl al-sha'r)*, to create a gap between the two front teeth, or to tattoo themselves, as mentioned in the Tradition narrated by 'Abd Allah ibn Masud that the Prophet said: "Allah has cursed those women who add hair extensions, practice tattooing and those who have themselves tattooed, those who reshape their eyebrows, and those who create a space between their teeth artificially to look beautiful, and hence changing the features created by Allah."[54] One is at risk of straying in understanding the implication of this Tradition, from the practices mentioned are not different from any other allowed beautifying practices such as make-up and henna; and yet, one is astonished at the strong tone in which the prohibition of those practices has been expressed.

> Nevertheless, the correct meaning of this, in my view, and I do not know of anyone who stated this clearly, is that the practice mentioned in the hadith were, according to the Arabic traditions of the time, indications of a woman's lack of chastity. Therefore, the prohibition of these practices was actually aimed at preventing promiscuity and the violation of the woman's honor when people associate her with such traits. Similarly, we read the following verse in the Qur'an: "O Prophet! Tell your wives and your daughter, as well as [other] believing woman, that they should draw over themselves some of their outer garments [when in public]: this will be more conducive to their being recognized [as decent women] and not annoyed" (33:59). This is a legislation that took into consideration an Arab tradition, and therefore it does not necessarily apply to people whose women do not wear this style of dress.[55]

Therefore, care and consideration of these matters and a thorough search for the legislative reasons relation to their genera enlighten us on an important issue. It shows us the difference in the Shari'ah particulars (juz'iyyat) between what is and is not appropriate to be taken as a reference rule (*asl*) for judging its analogs according to *qiyas*, for matters of Islamic legislation are not based on a single pattern.

It might also be appropriate to count as one aspect of the universality of the Shari'ah the fact that many matters many have been delegated to the ijtihad of its scholars. They are matters for which there is no textual evidence specifying the relevant rules or determining the intent of narrators in reporting them. Thus, it is reported that the Prophet said: "Allah has set up boundaries, so do not transgress them; He kept silent on certain things out of mercy on you rather than for- gleefulness, do not ask about them."[56] To this category belongs what we mentioned previously regarding the Prophet's prohibition on the Companions from writing down anything except the Qur'an, so that universal and permanent legislation would not be confused with temporary and particular cases.

---

[54] Bukhari, *Sahih*, 'Libas', hadith 5931-5948, pp. 1040-1042; Muslims, *Sahih*, 'Libas', Hadith 2125, p.845; Tirmidhi, *Sunnan*, 'Libas', hadith 1759, vol.4, p. 236; Ibn Majah, *Sunnan*, 'Nikah', hadith 1996, vol. 3,p.367.

[55] The author did not, however, maintain this view in his interpretation of the verse quoted here. Cf. his *Tafsir al-Tahrir wa al-Tanwir*, vol. 11/22, pp.106-107.

[56] Daraqutni, *Sunan*, 'Ashribah',hadith 104, vol.2/4, p.298. The complete version of this Tradition is cited by the author in Chapter "Alteration and Confirmation in the Shari'ah."

The Companions used to emulate the Prophet's deeds and judicial verdicts, though no specific texts were reported that required their continuity. These deeds and verdicts would have enlightened them on many aspects or what was right, because their circumstances were very similar to those prevailing during the Prophet's time. That is why 'Umar ibn 'Abd al-Aziz, during his governorship or tenure of the Caliphate, asked Abu Bakr ibn Muhammad ibn 'Amr ibn Hazm[57] to write down the transmitted Traditions of the Prophet.[58] I assume that he wanted those Traditions to provide a guiding light for the scholars of the ummah in understanding the objectives of the shari'ah. This is especially true when time is too short to allow a more careful consideration of the fundamental rules and essential proofs of the Shari'ah to derive new rulings from them, although they would possibly reanimate the provisions of those particular instances in similar circumstances. As 'Umar ibn 'Abd al-'Aziz said; "People face court cases inasmuch as they cause corruption."

An example of specification and determination is the scholars' preoccupation with gathering and studying the legacy of the rightly guided caliphs (al-khulafa al-Rashidun) in determining the exact punishment they applied to some crimes, and fixed amounts of poll tax (jizyab), land tax (kharaj), blood money, and compensation for injuries (urush). However, some of those amounts were subject to a reduction in both value and circulation, which meant that they became inadequate as an accepted indemnity.

Of the same kind is the Maliki jurists' fixation of *mawaqit*[59] of hajj, etc. This also includes what the jurists of the different schools fixed concerning the words and statements of divorce and oaths, though some of these expressions are no longer in use, and even when they are used, ehy have no clear and definite meaning. These specification should be seen only as examples for consideration as inspiring models.

In short, the universality of the Shari'ah and its inclusion of all humankind throughout the ages is a subject of unanimous agreement among Muslim schools. In addition, they are unanimously agreed on its suitability for human beings in all times and places. However, Muslim scholars did not show how that suitability is manifested. In my opinion, the suitability of the Shari'ah for humankind can be said to assume two different modes.

---

[57] Abu Bakr ibn Muhammad ibn 'Amr ibn Hazm was a man of knowledge, with an outstanding mastery of history. He served both as judge and governor of Madinah. When he died in the year 120 AH, he was more than 80 years old.

[58] It is narrated by Bukhari (*Sahih,* "Ilm', Bab 34, p.22) that 'Umar ibn 'Abd al-'Aziz wrote to Abu Bakr ibn Hazm, "Look for the knowledge of Hadith and have it written down, for I am afraid that religious knowledge will vanish and the learned men will pass away (die). Do not accept anything save the Sayings (hadiths) of the Prophet. Circulate knowledge and teach the ignorant, for knowledge does not vanish except when it is kept secret (to oneslef)."

[59] *Mawaqit* (sing.*miqat*) are the places where the *ihram* (i.e. intention to start the Hajj as well as wearing the Hajj attire) is to be formulated. For more details, see Ibn Rushd, *The Distinguished Jurist's Primer*, Vol. I,pp.381-384.

(1) The first mode is that the fundamental rules (*usul*), universal principles (*Kulliyat*), commands and injunctions (*ahkam*) of the Shari'ah are applicable to all circumstances without any difficulty or hardship. The evidence is the the way in which scholars of the Ummah have interpreted many of the textual proofs of those commands and rules to insure their flexible applications. Of course, each Shari'ah scholar participates in the interpretation. When their contributions are combined, we will have an abundant wealth of sound interpretation of the apparent meanings (zawahir) of the Shariah that makes its commands and rules suitably applicable to human beings under their different conditions.

An example of this is the prohibition of the renting of land. Malik and most of the jurist interpreted the rule as promoting piety and encouraging Muslims to assist one another without implying categorical proscription of the practice and invalidating contracts concerning it.[60] Another example is the prohibition of gaining a benefit from giving loans to others. Some Hanafi jurists took this prohibition to be confined to what is not a matter of need (*dauruah*), for which reason they sanctioned the sale of *wafa'*[61] in the vineyards of Bukhara.

(2) The second mode consists of the fact that the situations of all the peoples and nations throughout the ages have been receptive to the teachings of Islamic without any difficulty or hardship. This is evidenced by the transformation that Islam has brought about in the daily lives of the Arabs, the Persians, The Copts of Egypt, the Berbers, the Tartars, the people of India, the Chinese, and the Turks, without these people facing any difficulty or hardship in discarding their age-old bad habits or being compelled to forsake their established good customs.

---

[60] See a detailed discussion of the different views on the renting of land in Ibn Rushd, *The Distinguished jurist's Primer, vol.2,pp.264-267.*

[61] *Bay 'al-wafa'* was introduced and formulated by Hanafi jurists of Transoxiana during the 5th century AH. It has been expressed in different terms in others juristic schools, such as *bay al-ubdab* (the Malikis), *bay al-ta'ah* (the Hanabalis), *bay al-raja'* (the Zaydis), and '*bay al-Khiyar* (the Imamis).

It is defined as "a contract meant to ensure the payment of debt and to make…". Shaikh al-Islam Abu Abd Allah Muhammad Bayram II (d.1247 H), "al-Wafa' bi ma yata allaqu bi-Bay al-Wafa'", ed. and ann. Muhammad al-Habib ibn al-Khujah, *Majallat Majma al-Fiqh al-Islami,* no.7, vol. 3, 1412/1992, pp.187-306. See also, *The Mejele*, English translation of *majallat al- Ahkam al-Adliyyah* (a compendium of Islamic civil law according to the Hanafi school), (Kuala Lumpur: The Other Press, n.d.), pp.58-59; Mustafa Ahmad al-Zarqa, *Aqd al-Bay* (Damascus: Dar al-Qalam, 1420/1999), pp.155-165.

These two modes of the Shari'ah suitability are interconnected and thus complement each other. They have been expressed implicitly in the following Qur'anic verse: "and [Allah] has laid no hardship on you in [anything that pertains to] religion" (22:78).[62] Accordingly, the suitability of the Shari'ah should in no way be understood to mean that all human being are required to follow the customs and manners of a particular people or nation, such as the Arabs during the time of Revelation. Nor should it mean that other nations are bound to follow the special rulings and specific cases that conferred certain benefits on those who lived during the time of Revelation, whether or not they could be appropriate. This is to avoid the suitability of the Shari'ah being blemished by any difficulty or contradicting what is indispensable for human beings. some might under stand the underlying wisdom of the suitability of the Shari'ah to mean that human beings would live by it and implement its teachings in all ages without running the risk of perdition or distress. However, it this is the meaning of suitability, then it cannot in any way be considered a distinctive characteristic of the Islamic Shari'ah. This is because we do not find in the laws of humankind any provisions intended to lead human into destruction or anarchy when they are forced to abide by them. Otherwise, every nation could claim the characteristic of university and eternity for its law.

Therefore, it follows from this that the meaning of the suitability of the Islamic Shari'ah for every time and place must be understood in a different manner as follows. Its commands and injunctions *(ahkam)* consist of universal principles and meanings comprising wisdom and benefits *(masalih)*, which can be projected into various rulings that are diverse in form but unified in purpose. That is why the fundamental sources of Islamic legislation avoided detailing and determination [at the time or Revelation].

In this respect, we read in the Qur'an concerning the punishment of those who indulge in immorality: "And punish [thus] both of the guilty parties" (4:16). No mentions of 'flogging' or 'stoning' has been made here. Similarly, Muslims are discouraged in the Qur'an and Sunnah from indulgence in asking about the Shari'ah commands. Thus we read in the following verses:

'O you who have attained faith! Do not ask about matters which, if they were to be made manifest to you [in terms of law], might cause you hardship; for, if you ask about them while the Qur'an is being revealed, they might [indeed] be made manifest to you [as laws]. Allah has absolved [you from any obligation] in this respect: for Allah is Much-Forgiving, Forbearing. People before your time have indeed asked such questions - and in result thereof have come to deny the truth. (5:101-102).

---

[62] "The absence of any 'hardship' in the religion of Islam is due to several factors: (I) it is free of any dogma or mystical proposition which might make the Qur'anic doctrine difficult to understand or might even conflict with man's innate reason: (2) it avoids all complicated ritual or system of taboos which would impose undue restriction on man's everyday life: (3) it rejects all self mortification and exaggerated asceticism, which must unavoidably conflict with man's true nature; and (4) it takes fully into account the fact that 'man has been created weak'." *Asad, The Message of the Qur'an*, pp.517-518.

In an authentic Tradition, it is stated that, "He (that is, Allah) kept silent on certain things out of mercy on you rather than forgetfulness, so do not ask about them."[63] In another tradition, it is said, "The most sinful person among the Muslims is the one who asked about something which had not been prohibited, but was prohibited because of his asking."[64]

The Prophet forbade Muslims to write down anything other than the Qur'an. The reason was that he used to make statements and deal with people in different ways that were the result of particular circumstances, which narrators might believe to be of universal and permanent bearing. One instance of this is the Tradition according to which "Allah's Apostle gave pre-emption (*shuf'ah*) to the neighborhood.[65] Our scholars have maintained that this report bears no authoritative evidence because it was probably restricted to the case of a specific neighbor; who happened to be partners and a neighbor at the same time. However, the narrator thought the case was judged on the basis of neighborhood.[66] It is also reported that Malik ibn Anas disliked the supposition of cases of fiqh, for he used to say to anyone asking about hypothetical cases: "Leave them alone until they take place."[67]

---

[63] This saying has already been documented.

[64] Bukahari, *Sahih*, itisam', hadith 7289, p.1254; Muslim, *Sahih,* Fada'il hadith 2358,pp.920-921. On the issue of the 'silence of the Lawgiver' *(sukut al- Shari)* and its juristic significance and implications, see Nu'man jughaym, *Turuq al-kashfan Maqasid al-Shari* (Amman: Dar al-Nafa'is, 1422/2002), pp.187-213.

[65] Abu Bakr Abd Allah ibn Muhammad ibn Abi Shaybah, *al-Musannaf*, ed. Kamal Yusuf al-Hut (Riyadh:Maktabar al-Rushd, 1409), hadith 22716, vol. 4,p.518; Ahmad ibn Muhammad ibn Salamah ibn 'Abd al-Malik Abu ja;far al-Tahawim *Sharh Ma'ani al-Athar*, ed, Muhammad Zuhri al-Najjar (Beirut: Dar al-Kutub al-Ilmiyyah, 1399), vol.123.

Similar reports are also available in Bukhari, *Sahih*, 'Shuf'ah', hadith 2258, p.359: 'Hiyal', hadiths 6977-6981, pp.1203-1204, Abu Dawud Sulayman ibn al-Ash'ath, *Sunan*, ed. Muhamad Muhyial- Din 'Abd al-Hamid (Beirut: Daral-Fikral – Arabi, n.d.), 'Ijarah', hadith 3517, vol. 3,p.186: Ahmad ibn al-Husyan ibn 'Ali Abu Bakr al-Bayaqi, *al-Sunan al-Kubra*, ed. Muhammad 'Abd al-Qadir Ata (Makkah al-Mukarramah: Maktabat Dar al-Baz, 1414/1994), hadith 1136, vol.6,p.106; Sulayman ibn Ahamad ibn Ayyub Abu al-Qasim al-Tabarani, *al-Mujam al-Kabir*, ed. hamdi ib 'Abd al-Majid al-Salafi (Mosul: Maktabat al-Ulum wa al-Hikam, 1408/1988), hadith 6803, vol. 7, p.196.

[66] In this respect, two traditions have been narrated, one on the authority of Jabir ibn 'Abd Allah and the other on the authority of Jabir ibn 'Abd Allah ibn 'Abbas, according to which the Prophet judged a case on the basis of pre-emption for a neighbor. Nasa'i, *Sunan,* ed. Adb al-Fattah Abu Ghuddah (Aleppo: Maktab al-Matbu'at al-Islamiyyah, 1406/1986), hadith 4705 (Jabir), vol. 7, p.321; Ibn Abi Shaybah, *Musannaf,* ed. Kamal Yusuf al-Hut (Riyadh: Maktabat al-Rush, 1409 AH), hadith 22716 ('Ali & Abd Allah), vol. 4,p.518.

See a detailed discussion of the different views with their respective evidence in Ibn Rushd, *The Distinguished jurist's Primer,* vol.2, pp. 307-316; Badr al-Din Abu Muhammad Mahmud ibn Ahmad al-Ayni, *'Umdat al-Qari Sharh Sahih al-Bukhari* (Beirut: Dar Ihya' al-Tuath al-Turath al-'Arabi, n.d.), Vol. p.21.

However, since the Qur'an was revealed on different occasions and addressed different situations, and since its purpose was to guide the community in various ways, and because inimitability *(I'jaz)* was intended to be one of its essential characteristics, we find that it comprises various modes of legislation. It contains permanent general and universal forms of legislation. It also contains legislation as particular rules dealing with specific real cases, thus serving as examples for understanding the fundamental universal rules. Likewise, there are in the Qur'an particular legislative rules that are equivalent to the particulars of the Sunnah, such as Allah's saying: "As for the adulteress and the adulterer – flog each of them with a hundred stripes" (24:2); and "And for those women whose ill-conduct you have reason to fear, admonish them [first]; then leave them alone in bed; then chastise them" (4:34)"[68]. And there is in it abrogated legislation. Yet, most of the Qur'anic legislation belongs to the universal permanent type.

The Sunnah was collected and classified by the scholars from the generation of the Companions and their successors. the motives for the its collection and classification were different, as were the criteria for the acceptance of reports. It mostly consists of particular legislative provisions, because it dealt with individual cases *(qadaya a'yan)*. However, it contains manifest general legislative rules that are an appropriate basis for universal permanent legislation.

Consequently, it is inevitable that *mujtahid* scholars examine Islamic legislation in both ist universal and particular forms. It is their duty to make every effort to distinguish in the Qur'an and Sunnah between these to modes and classify the texts of the Shari'ah correctly. This is indeed a great task to which our ancient scholars contributed their very best and produced relevant insights.

Equality in the Shari'ah

One of the most important consequences of the universality of the shari'ah, whose consideration depends on the proper understanding of its meaning and its different modes and manifestations, is the question of the meaning and nature of equality in the community, how Shari'ah achieves it amongst its members, and how much it is taken into account. This because Muslims are equal members of the Muslim community according to Allah's decree: "All believers are but brethren" (49:10). Brotherhood implies universal equality,, according to which all Muslims are entitled to the same rights accorded them by the Shari'ah without any discrimination in all matters that do not allow for variation between Muslims. knowing that Muslims are equal owing to their common created nature and their unity of religion, we can ascertain that they are worthy of being equal under the Shari'ah law, regardless of their level of power. Thus, neither the strength of the powerful raises them above others in the sight of the Shari'ah, nor does the humility of the weak bar them from equal treatment by it.

---

[67] Muhammad ibn Muhamma al-Ra'I, *Intisar al-Faqir al- Salik* (Beirut: Dar al- Gharb al-Islami, 1981), p.186.

[68] For a discussion of a new interpretation of this *ayah* see: Abdul Hamid Abu Sulayman, *Marital Discord: Recapturing the full Islamic Spirit of Human Dignity* (London: IIIT, 2003). [Translator]

Likewise, because Islam is fundamentally the religion of nature *(din al-fitrah)*, anything in which the primal human nature (*fitrah*) attests to equality between human beings is treated by Islamic legislation accordingly. However, the Shari'ah also avoids imposing equality and similarity on anything in which the primal human nature confirm variation. Variation is left to be dealt with by the social and civil systems according to the politics of Islam rather than by its fundamental legislative rules. Concerning equality, Allah says:

> O you who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth for the sake of Allah, even though it be against your won selves or your parents and kinsfolk. Whether the person concerned be rich or poor, Allah's claim takes precedence over [the claims of] either of them.[69]

As far as difference is concerned, He says:

> "Not equal are those of you who spent and fought [in Allah's cause] before the Victory [and those who did not do so]: they are of a higher rank than those who would spend and fight [only] after it."[70]

Under Islamic legislation, equality in society stems from the equality of human beings in their inborn nature and in all related matters, in which variation [between individuals] has no implications for the well-being and virtue of society *(salah al-alam)*. Thus, human beings are the same in respect of their humanity: "All of you are children of Adam."[71] They are also equal in their right to live in this world because of their primal nature, and no differences in color, anatomy, race, or place can affect that equality. This basic equality insures their equality in the fundamentals of Islamic legislation, such as the right to existence, expressed by the terms "protection of life" and "protection of progeny", and to the means of life, expressed by the term "protection of property". Among the foremost means of life to which human beings are equally entitled is the right to live on the land that they have acquired or where they were born and brought up. They are also equally entitled to the mans of living a proper and good life known as the "protection of intellect" and "protection of honor". Above all is the right of belonging to the religious community *(jami'ah diniyyah)*, expressed by the phrase "protection of religion". The way to achieving these rights have been mentioned and further discussion follows in order of their importance.

---

[69] Al-Qura'n 4:135.

[70] Al-Quran 57:10.

[71] Ahmad ibn Hanbal, *al-Musnad,* vol.4,p.158 and vol.5,p.411; Abd al- Rauf ibn 'Ali al-Manwi, *Fayd al-Qadir bi- Sharh al- Jami al- Saghir* (Beirut: Dar al-Ma'rifah, 1972), hadith 6368, vol.5, p.37.

It thus becomes clear that human beings in the Shari'ah are equal with regard to what is indispensable *(daruri)* and necessary *(haji)*. There is no distinction between them in the *daruri,* and seldom do we find differences between them concerning the *haji*, such as depriving the slave of the legal capacity *(abiyyah)* to act freely in his property except with the permission of his master. Only when there are valid reasons preventing equality *(mawani)* do differences between human beings arise.

Accordingly, equality in Islamic legislation is a fundamental principle that operates unfailingly except in situation where there are valid *mawnai*. This means that, to establish the equality of individuals or groups in Islamic legislation, we are not required to search for its underlying reasons *(mujib)*; it is sufficient to insure that nothing contravenes equality. That is why the scholars of the Ummah hinsised that the Qur'anic discourse in the masculine form include women as well.[72] Moreover, to apply the Shari'ah injunction to women, there is no need to change the discourse of the Qur'an and Sunnah from the masculine to the feminine from, nor vice versa. It is reported in *Sahbi al-Bukhari* on the authority of 'Ubadha ibn al-Samit that he said: "While we were with the Prophet *(SAAS)*, he said, 'Will you swear to me the pledge to allegiance that you will not worship anything besides Allah, Will not commit illegal sexual intercourse, and will not steal?' Then he recited the verse concerning the women."[73] The rule governing the acts issuing from Allah's Apostle is that they are legislated for the whole community on equal terms, unless it is proven that something is specific to him.

---

[72] See a more detailed discussion of this issue by the author in his Usul al-nizam al- Ijtima iffial- Islam, pp. 156-162.

Muslim legal theorists *(usuliyyun)* dealt with this issue in their discussion of the subject *umum*. See for example, Abu Muhammad 'Ali ibn Ahmad in said Ibn Hazm, al-Ihkam fi Usul al-Ahkam, ed. Muhammad Muhammad Tamir (Beirut: Dar al-Kutub al-Ilmiyyah, 1424/2004), vol. I, pp. 408-414; al-Qafafi, Sharah Tanqih al-Fusul, pp. 156-157; Najm al-Din al-Tufi, *Sharh Mukhtasa al- Rawdah,* vol.2, pp.514-5523; Badr al-Din Muhammad ibn Bahadar ibn Abd Allah al-Zarkashi, al-Bahr al-Muhit Fi Usul al-Fiqh, ed. Muhammad Muhammad Tamir (Beirut: Dar al-Kutub al-Ilmiyyah, 1421/2000), vol.2, pp.331-336; Muhammad ibn 'Ali al-Shawkani, *Irshad al- Fuhul Ila Tahquq al-Haqq Min 'Ilm al-Usul,* ed. Muhammad Subhi ibn Hansan Hallaq (Damascus/Beirut: Dar Ibn Kathir, 1421/2000), pp.435-439; Bernard G. Weiss, The search For Allah's law, pp.437-438.

[73] This is verse 12 of Surah 60, Which reads as follows; "O Prophet! Whenever believing women come to you to pledge their allegiance to you, [pledging] that [henceforth] they will not ascribe divinity, in any way, to aught but Allah, will not steal, will not commit adultery, will not kill their children, will not indulge in slander, falsely creating it from nothing, and will not disobey you in anything [that you declare to be] right-then accept their pledge of allegiance, and pray to Allah to forgive them their [past] sins: for, behold, Allah is Much Forgiving, a Dispenser of Grace.

Impediments to Equality

Impediments (*mawani*) to equality consist of incidents (*awarid*) which, when they occur, necessitate that suspension or abolition of equality because of certain predominant *maslahah* or *mafsadah* resulting from its implementation. I man by *awarid* considerations arising from the circumstances of the application of equality in certain cases so that adherence to equality either does not produce the desired good that might rather lie in its opposite, or it results in greater of total evil. Designation such impediments such impediments as *'awarid* does not mean that they are necessarily temporary, for they might be permanent or frequent. They are described as *'awarid* because they hinder the implementation of a primary rule in the Shari'ah. Likewis, those impediments are considered accidental owing to their effect in suspending principle, since, as we have already shown, equality is the norm in Islamic legislation.

Taking into account these incidents and their effect of suspending equality is subject to the following rule. They must be restricted to the purpose for which they are appropriate to suspend equality and be assessed in accordance with the extent of their occurrence, permanence, or prevalence. For example, in a meritocracy, the excellent and the less excellent are not given the same amount of rewards, although this unequal treatment does not affect their equality in other rights. Therefore, the criteria for evaluating the extent to which those obstacles could remove quality between human beings stem from either a careful rational consideration (*ma'na*) requiring the suspension, or the rules of codified law. Thus, ascertaining the inequality between someone who is knowledgeable in a specific branch of knowledge and someone who is not is due to the reason for suspending their equality.

Moreover, the inequality of certain rights between Muslims and non-Muslims living under Islamic rule *(abl al-dhimmah)*, such as the competency to occupy religious posts, is also based on a specific rationality. This is because correctness of belief is among the fundamentals of Islam, which means that the unsoundness of the faith of non-Muslims implies their deficiency in the sight of the Shari'ah to be entrusted with the control of Muslim religious affairs. Furthermore, it is difficult to anticipate and measure the effect of their conduct on the Muslim community if they are given authority over Muslim religious affairs. Accordingly, Muslim scholars agreed on preventing non- Muslims from holding certain official posts.

Determining the inequality between non-Muslims in certain rules of transactions (*mu'amalat*), is covered by the rules of codified law, which is a matter of the particular details *(furu)* of the Shari'ah. It depends on the judgment of the jurists and their understanding of Islamic teachings. One example of this is the inequality between non-Muslims and Muslim relatives concerning inheritance by Muslim relatives, which is a matter of agreement between the scholars.[74] All these matter are referred to the rules governing the codification of the applied Shari'ah ruling (*furu*), which constitutes part of the jurists' task.

---

[74] This is based on the Prophet's saying reported by Bukhari (Sahih, 'Fara'id, hadith 6764, p.1167) on the authority of Usamah ibn Zayd: "A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim." The juristic agreement on this

The equality between non-Muslims and Muslims in most of the rights in secular transactions *(mu'amala)* has been clearly established by the Prophet in following saying: "They are entitled to the same rights as we are, and they shoulder the same responsibilities as we do."[75] It is moreover grounded in our knowledge that equality of the subjects of the same government is a fundamental principle (asl) that does not need any further justification. However, Allah's Apostle made the above statement that this principle is firmly established. Some obstacles to equality are not obstacles to equality are not obstacles in the real sense. They rather consist of situations where the grounds for equality do not exist. An example is the inequality between any member of the Muslim community and the Prophet's Companions concerning the merits and virtues of Companionship, for he or she has missed the privilege of combining seeing and accompanying the Prophet with believing in him as Allah's Apostle.

Furthermore, the obstacles preventing equality in certain areas of the Shari'ah can be divided into four categories: inborn and natural (*jibilliyyah*), legal (*Shari'yyah*), social (*ijtimaiyyah*), and political (*siyasiyyah*). These considerations might be permanent or temporary, major or minor. The natural, legal, and social considerations relate to moral conduct, the respect of others' rights, and the orderly and etical management of the affairs of the Muslim community. Political considerations aim at protecting Islamic political power from being undermined.

Permanent natural obstacles of equality include the inequality of man and woman in certain areas, in which woman is by nature weaker than man, such as army command and the office of the sovereign (*khilafah*) according to all scholars,[76] They also

---

issue does not, however, rise to the level on universal consensus (ijma) as the author's expression might imply. At best, it is a majority view. Among the scholars who contested it were Ibn Taymiyyah and his disciples Shams al-Din Abu Abd Allah Muhammad ibn Abi Bakr Ibn Qayyim al-Jawziyyah. The latter devoted to this question a lengthy and detailed discussion in his book *Ahkam Ahl al-Dhimmah,* ed. Subhi al-Salih (Beirut: Dar al-Ilm li al- Malayin, 1994), vol. 2, pp.462-474. Recently, the renowned scholar Yusu al-Qaradawi has strongly supported the position of the two Hanabali jurists in a fatwa that he issued in response to a question from a British Muslim concerning the lawfulness of inheriting from his Christian parents. See his *Fi Fiqh al-Aqalliyat al-Muslimah* (Cairo: Dar al-Shuruq, 1422/2001), pp.126-131.

[75] This is part of long directive that the Prophet used to address to the leaders of expeditions against Arab polytheists. Its exact wording runs as follows: "If they (Arab polytheists) accept the *dhimmah* contract (*aqd al-dhimmah*), then inform them that they have the same right and duties as Muslims." *Ala al-Din Abu Bakr al-Kasani, Bada'I al-Sana'I fi Tartib al-Shara'I* (Cairo: Sharikat al-Matbu'at al-'Ilmiyyah, 1327 AH), vol. 7,p.100. See also, Abd al-Karim Zaydan, *Ahkam al-Dhimmiyyin wa al-Musta'manin* (Beirut: Mu'assasat al-Risalah,1988), vol.2,p.70.

[76] The view of the jurists regarding the illegibility of woman for the office of the supreme leader (imamate) is mainly based on a isolated Tradition reported by Abu Bakarh. He said, "During the battle of the Camel [between 'Ali and 'A'ishah], Allah benefited me with

include inequality of man and woman in the right of custody over young children.[77] Next to the natural impediments to equality come considerations that are closely linked to them, Which stem from original human nature, such as the inequality of man and woman whereby the woman is not required to support her husband financially since it has become and established custom that generally it is the man who should maintain the family. This custom is a manifestation of man's inborn disposition enabling him to bear the pain of hard work in earning and accumulating wealth.

There are also certain acquired qualities that are the result of both original human nature and personal endeavor. These acquired qualities are important in molding a person's inborn character, and only those who possess their proper means will attain them in such a way that they will be reflected in perfecting their perception and thinking This is manifested in the differences in people's minds and talents concerning their to comprehend hidden truths and subtle meaning. Thus, a person who is knowledgeable cannot be regarded in the same way was someone who is not in all matters in which difference of intellectual perception and comprehension is decisive. Examples of this inequality include the capacity to interpret the Shari'ah and to comprehend those aspects of it that are the subject of subtle derivation and reasoning. They also include the capacity to understand the Shari'ah concerning different situations and apply them properly to their relevant subjects, such as distinguishing between complicated cases, detecting the tricks used by litigants in court cases, and determining the integrity (adalah) of court witnesses. That is why priority is given to those who have attained the level of ijtihad over who have not in the eligibility assume judgeship, thus preventing their equality with scholars of lower ranks. The same principle is applied to those who are closer to the level of ijtihad and those who are not.

It is, therefore, the duty of both jurists and rulers to take into account those obstacles and realize their scope and the extent to which they have become deeply rooted in human life. Then, once this is done, they must consider their effects on equality

---

a Word (I heard from the Prophet). When the Prophet heard the news that the people of Persia had made the daughter of Khosroe their Queen (ruler), he said, 'Newer will succeed such a nation as makes woman their ruler.'" *Bukhari, Sahih*, 'Maghazi, hadith 4425, P.753 and 'Fitan', hadith 7099, p.1224.

This issue in particular and women's participation in politics in general have been the subject of heated debate of the last few decades, epecially as much criticism has been levied against Islam on account of this and other related issues. See a succint discussion of the conflicting views and their respective arguments in Rached al-Ghannushi, *al-Hurriyyat al-Ammah fi al-Dawalb al-Islamiyyah* (Beirut: Markaz Dirasat al-Wihdah al-Arabiyyah, 1993), pp.128-133.

[77] According to the majority of Muslim jurists, *hadanab* or custody belongs to the mother if she is divorced by the husband and the child is still of tender age. This majority view has been based upon the following Tradition, according to which the Prophet is reported to have said: "He who causes separation between a mother and her child, Allah will cause a separation between him loved one on the Day of judgment." Ibn Rushd, *The Distinguished jurist's Primer*, vol.2,p.66.

accordingly They must also differentiate in those obstacles to freedom between what is only remotely to the human being's innate disposition disposition (jibillah) thus being susceptible to removal by the existence of its opposite causes- and what unclear in its relationship with it. They should be careful of the first category of obstacles to avoid formulating permanent Shari'ah rulings for them, whereas hey should disregard the second category unless experience has proven them to be worthy of consideration.

Legal impediments, consist of circumstances whose impact on equality has been recognized by Islamic legislation. Indeed, real and just legislation can be based only on wisdom and sound reasons that might be manifest or hidden. This means that the Shari'ah is the reference and guide in specifying these impediments and determining these impediments and determining their effects by taking into account specific legislative rules whose implementation overrides the realization of equality. These legislative rules are based on the Shariah fundamental universals, such as the protection of lineage (*hifz al-ansab*) preventing the equality of me and women concerning polygamy. If polyandry were allowed, the safeguarding of lineage could not be achieved. These principles can also be known by inference from the particulars of the Shari'ah, such as the requirement of the testimony of two women specifically in financial and commercial matters.[78]

Social obstacles of equality are mostly based o what is considered to be the general good for society. Some might have a rational basis, whereas other might be the result of deeply rooted conventions in people's lives. An instance of the rational kind is the inequality of the ignorant person and the knowledgeable in their capacity to manage the public affairs and interests of the community. [Historically] the other kind [was] illustrated by the inequality of salves and freemen in the acceptance of their testimony. Yet, we find that most of the social obstacles of equality are always open to ijtihad, and it is seldom that the Shari'ah has established hard and fast rules regarding them.

Political obstacles stem from the general conditions affecting the political life of the community. They might require the suspension of the principle of equality between certain groups or individuals or under particular circumstances, for the sake of a specific interest deemed of a higher value for the Islamic state. One of their features is that they are mostly subject to temporary consideration. An example of permanent consideration is the restriction of the imamate to the tribe of Quraysh,[79] where the Prophet's statement on the day of the conquest of Makkah *(al-Fath)*: "Who enters the house of Abu Sufyan, he is safe" [80] is obviously of temporary purport.

---

[78] This is by virtue of the following Qur'anic provision: "And call upon two of you mean to act as witnesses; and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her." (2:285).

"The stipulation that two women may be substituted for one male witness does not imply any reflection on woman's moral and intellectual capacities: it is obviously due to that fact that, as a rule, women are less familiar with business procedures than men and, therefore, more liable to commit mistakes in this respect." Asad, The message of the Qur'an, p.63, note 273. See a detailed exposition of the different juristic views on the validity and scope of woman's testimony independently or with male witnesses in Ibn Rushd, The distinguished jurist's Primer, vol. 2 ,pp .558-560; Abd al-Ghani al-Maydani, al-Lubab fi Sharb al-Kitab (Beirut: Al-Maktabah al-Ilmiyyah, 1400/1980), vol.4, p.54.

Freedom in the Shari'ah

It has already been established that equality is one of the objectives of the Shari'ah. It necessarily follows that equality of the community's members in freely conducting their personal affairs constitutes one of the primary goals of the Shari'ah. This is what is meant by "freedom." The Arabic term *hurriyyah* has been used to denote two meanings, one deriving from the other.

---

[79] The author is here merely reiterating the classical view of Muslim jurists concerning the Qurayshite descent as one of the conditions for the office of the caliphate. However, the validity of this condition has been disputed by a number of eminent jurists an scholars, such as Imam al-Haramayn Abu al-Ma ali al-Juwayni and Ibn Khaldun. For al-Juwayni, al-Ghyathi, (Beirut: Dar al-Kutub al-Ilmiyyah, 1417/1997, p.140), the Qurayshite descent (al-nasab al-Qurayshi) is unnecessary on the gounds that "nothing of the purposes (maqasid) of the imamate depends on belonging to a specific descent or ancestry", for we know that the purpose of investing someone with the office of the imam is to insure "the orderly running (*intizam*) of the affairs of Muslims and Islam."

In the same vein, Ibn Khaldun discussed the condition of the Qurayshite descent and reformulated it his theory on group feeling and social cohesion. After stating the alleged consensus on it among the jurists, he said: "We shall now discuss the wisdom of making descent a condition of the imamate, so that the correct facts underlying all those opinions will e recognized. We say: all religious laws must have (specific) purposes and significant meanings of their own, on account of which they were made. If we, now, investigate the wisdom of Qurashite descent as a condition (of the imamate) and the purpose which the lawgiver (Muhammad) had in mind, (we shall find that) in this connection he did not only think of the blessing that lies in direct relationship with the Prophet, as generally (assumed). Such direct relationship exists (in the case of Qurayshite descent), and it is a blessing. However, it is known that the religious law has not as its purpose to provide blessings. Therefore, if (a specific) descent be made a condition (of the imamate) and the purpose which the lawgiver (Muhammad) had in mind, (we shall find that) in this connection he did not only think of the blessing that lies in direct relationship with the Prophet, as is generally (assumed). Such direct relationship exists (in the case of Qurayshite descent), and it is a blessing. However, it is known that the religious law has not as its purpose to provide blessings. Therefore, if (a specific) descent be made a condition (of the imamate), there must be a (public) interest which was the purpose behind making it into law. If we probe into the matter and analyze it, we find that the (public) interest is nothing else but regard for group feeling. (Group feeling) gives protection and helps people to press their claims. The existence of (group feeling) frees the incumbent in the position (of imam) from opposition and division. The Muslim community accepts him and his family, and he can establish friendly terms with them."

He then went on to say: "The Quraysh were able to assume the responsibility of doing away with (division) and preventing people from (splitting up) Therefore, qurayshite descent was made condition of the institution of (the imamate). The Quraysh represented the strongest (available) group feeling…. Thus, all the other Arabs obeyed them." Ibn Khadun, *The Muqaddimah*, vol. I, pp.399-400.

[80] Muslim, Sabih, 'Jihad', Hadith 1780, vol.3, pp.1406 and 1408.

(i) The first meaning is the opposite of slavery. It refers to the original ability of all rational and mature people to handle their affairs themselves without depending on the consent of someone else. By the phrases "original" and "by himself", I mean to exclude the conduct of the husband and wife concerning marital rights and the conduct of the legally incompetent (*sufaha*) in handling their property, the conduct of two contracting parties in accordance with the terms of the contract. These matters have been excluded from this first meaning of freedom because the conduct of each one of these categories of people depends on the consent of someone else. This dependence is not original. It is something conventional to which one binds oneself by a contract. However, in the final analysis, it constitutes a voluntary act whereby a person puts restrictions on one's personal freedom for one's own interest. As mentioned previously, this meaning of *hurriyyah* is the opposite of slavery. Accordingly, slavery means the inability of people to act by themselves except with the permission of their masters.

Slavery itself emerged as a result as a result of hegemony and domination in ancient times force was the sole arbiter in human affairs. Captivity in wars and invasions was one of the most prominent manifestations and products of slavery. During their captivity, prisoners used to undergo various kinds of oppression. However, if their captors decide to spare their lives, they would be enslaved and thus would act only according to the will of their masters. Enslavement was considered transferable from one hand to another. Likewise, the captors of prisoners of war might hand them over to others who might be hostile towards them so that they would either kill them or subject them to forced labor. They might also sell their prisoners to benefit from their price and thus they would become slaves to their buyers.

(ii) The second meaning of the term *hurriyyah* derives from the first by metaphorical usage. It denotes one's ability to act freely and handle one's affairs as one likes, without opposition from anyone. This is the opposite of having one's hands tied or being unable to act freely. Having one's hand tied or being unable to act freely. Having one's hands tied describes a person who, owing to powerlessness, poverty, lack of protection, or pressing need, is drive n into a situation similar to that of a slave, in which he or she is subject to the will of someone else in all his or her dealings. One is thus deprived of all sense of self-respect and condemned to accept humiliation.

These two meanings of freedom have been intended by the Shari'ah, for both stem from *fitrah* and reflect the notion of equality that constitutes, as shown earlier, one of the essential objectives of the Shari'ah. It was in ths light that 'Umar ibn al-Khattab exclaimed: "On what grounds do you enslave people whose mothers have born them free?"[81] –meaning that being free is something inherent to man's inborn nature.

The usage of the first meaning in the Shari'ah is common and well established. One of the maxims of Islamic jurisprudence states: "The Lawgiver aspires for freedom."[82] This has been inferred from various dispositions of the Shari'ah indicating that one of its main objectives is to abolish slavery and promote freedom for all. However, the diligence of the Shari'ah in considering public and shared interests and safe guarding the social order prevented it from freeing the slaves and abolishing the factors of slavery all at once. although this would have served its purpose. This was because the institution of slavery constituted an essential element of human societies at the advent of Islam. Thus, male slave were workers on the farms, servants in the household, gardeners, and shepherds, while female slaves were like spouses to their owners, and worked as maids in their households and nurses for their children. Furthermore, slaves were one of the most important categories constituting the basis of the family and socio economics system of peoples and nations at that time. Had Islam sought to transform that order in a radical way, this would have led to the breakdown of human civilization in such was the main reason why the Shari'ah refrained from any abrupt abolition of the existing slavery system.[83]

---

[81] Ali ibn Husam al-Din ibn 'Abd al-Malik al Muttaqi al-Hindi, *Muntikhab Kanzal-Ummal i Sunan al Aqwalwaal al-Af al* (Beirut: Dar Ihya'ak Turathal Arabi 1410/1990(, Vol.4, P.577

[82] This juridical norm stating that al-Shari *mutashwwif li al-hurriyyah* has been mainly formulated by the jurist in conjunction with their discussion of the Shari'ah provisions governing marriage between free men and female slaves. See for example, Shams al-Din Muhammad ibn al-Khatib al-Shirbini, *Mughni al-Muhtaj ila Ma'rifat Alfaz al-Mihaj*, ed. Jawbali al Shafi (Beirut: Dara al-Fikr, 1419/1998),Nikah, Vol 3, p.239.

It can be inferred from numerous legal provisions (*ahkam*) stipulated by the Shari'ah on different occasions that all have the united aim of promoting the manumission and emancipation of slaves. The author has cited a number of these provisions throughput the present charpter.

[83] The same vein, the eminent poet-philospher Muhammad Iqbal wrote in 1909: "The Prophet of Islam, being a link between the ancient and modern world, declared the principle of equality and thought, like every wise reformer, he slightly conceded to the social conditions around him in retaining the name of slavery, he quietly took away the

The Shari'ah abstention from totally abolishing the causes of enslavement – especially prisoners of was and preventing their renewal, can be explained as follows: For a long time before the coming of Islam, it had been an established tradition that nations would enslave and make use of the groups and individuals taken prisoner in wartimes. Likewise, one of the great objectives of the strategy adopted by Islam, was to put an end to the excessive aggression of the dominant nations, restore justice to the weak, and help them take revenge on their aggressors. Spreading its message and enhancing its authority in the world were the means employed by Islam to achieve this objective. However, if the powerful nations at that time dominating the world were to feel secure from falling as prisoners of war into the hands of the rising Muslim power (and enslavement was the consequence of war which those nations feared and disliked most) they the Arabs and others-would not have wavered for a moment in rejecting the message of Islam. They would have relied on their strength and large numbers to maintain their dominance and independence.[84] In this respect, Safawn ibn Umayyah[85] said: "To be subjugated by a man from the Qurayash [his

---

whole spirit of this institution..... The democratic ideal of perfect equality, which had found the most uncompromising expression in the Prophet's life, could handling of the situation." *Thoughts and Reflection* of Iqbal, ed. and cannot. by Syed Abdul Vahid (Lahore: Shaikh Muhammad Ashraf, 1992), p.39. See also a very pertinent discussion of the issue of slavery as tackled by Islam in Marcel A. Boisard, *Humanism in Islam* (Kulala Lumpur : Islamic Book TRUST, 2003), pp.77-82.

[84] The Justification given here by the author is untenable. For one, the reason why people embraced the belief system of Islam, submitted to the laws of the Shari'ah and belonged to its community could by no means be the fear of being enslaved by the Arab Muslims during the early Islamic conquests. Otherwise, we should except many people to have renounced Islam following the military and political decline of Muslim power in the world.

[85] Safwan ibn Umayyah ibn Khalaf was deadly enemy of Islam. His father Ummayyah was killed during the battleof Badr, while his mother Naiyah bint al-Walid ibn al-Mughirah embraced Islam. When Makkah was liberated from the pagan forces of the Quraysh, Safwan, ran away to Jeddah with the intention of going to Yemen. Umayr ibn Wahb, a close friend of Safwan, who had converted to Islam after showing deep hatred and enmity against its Messenger, came to the Prophet and told him about Safwan. The Prophet gave him his turban and said "This is a sign of amnesty." Umayr went to Safwan with the turban and told him that he had no cause to run away, for his safety had been guaranteed. When he came to see the Prophet, he said, "Have you given me safety?" The Prophet said, "Yes, it is true." Later, he too became a Muslim and distinguished himself in the service of Islam (Ibn Hisham, *al-Sirah al-Nabawiyyah*, vol. 2/4, p.47). Safwan died in thesame year as Uthman ibn Affan (35/656).

tribe] is better for me than to be subjugated by a man from the Hawazin."[86] In the same vein, the pre-islamic Arab poet, al-Nabighah,[87] said:

> I am always watching out so that I will not be subjugated, Nor will
> my women be humiliated until they die noble and free.[88]

Likewise in pursuing its objectives, Islam aimed at striking a balance between spreading freedom and preserving the order of the world by promoting the means to freedom over those of slavery. Thus, it combated the causes of slavery by reducing their number and tackling what remained of them in various specific ways. Hence, the Shari'ah abolished many factors leading to slavery except prisoners of war. For instance, it abolished voluntary enslavement, where one would sell oneself, or the eldest of the family selling some of its members, a practice that had been sanctioned by many laws of the world. It also abolished slavery as a punishment for committing an offense, whereby the offender would be sentenced to become a slave to the person against whom the offense had been committed. This has been described by the Quar'an in relation to the situation that had prevailed in Egypt.

> [The brothers] replied: "Its requital? He in whose camle-pack [the cup] is found, shall be [enslaved as] in requital! Thus do we [ourselves] requite the wrong doers." Thereupon [they were brought before Joseph to be searched: and] he began with the bags of his half-brothers before bag of his brother [Benjamin]: and in the end he brought forth the drinking-cup out of his brother's bag. (12:75-76).

In addition, Islam abolished enslavement in payment of debt, a practice that was part of the Roman Law[89] and Solon's law[90] that had preceded it in

---

[86] Ibn Hisham, _al-Sirah al-Nabawiyyah,_ vol. 2/4, p.67.

[87] Al-Nabighah al-Dhubyani was a pre-Islamic Arab poet who lived in the fifth century AC. He flourished at the court of the princes of Hirah, especially during the reign of al-Nu'man ibn al-Mudhir III.

[88] Al-Nabighah al-Dhubyani, *Diwan*, ed. Muhammad al-Tahir ibn Ashur (Tunis: al-Sharikah al-Tunisiyyah li al-Tawzi, 1976), p.115.

[89] According to Marcel Boisard, thanks to Islam's fundamental view of the human being as a creature dignified by Allah, his Creator, the status of slaves in Islamic society was never that of a "thing" of the Roman law. "no discredit soiled his status. Contrary to medieval Christianity, Muslim doctrine, strongly impregnated by Qur'anic prescriptions, was not influenced by the theories from Greek antiquity, especially those of Aristotle, concerning slavery." Biosard, *Humanism in Islam*, p.79.

[90] Solon was the Lawmaker of Athens. He died in559 BC. He is usually remembered as one of the Seven Wise Men of Greece, also called Sophoi. This term is traditionally used to describe a group ancient Greek sages of the 7th and 6th centuries BC, drawn from among

Greece.[91] It also categorically forbade enslavement during times of oppression and internal strife between Muslims. It abolished the enslavement of wayfarers, another common practice, such as the caravan that enslaved Joseph when they found him.[92]

Further some, Islam approached slavery as it actually existed or exist might exist in the future and deal with it by adopting two methods. One aimed at eliminating altogether the harmful results of slavery by multiplying the means of its abolition. The other method consisted of alleviating the effects of existing slavery by reforming the behavior of slave masters, that was mostly oppressive.[93] As an aid to the abolition of slavery, Islam allocated a certain proportion of the zakah to buying slaves and freeing them, as clearly stated in the Qur'an:".... and for the freeing of human beings from bondage" (2:177). It also made the manumission of slaves one the options of obligatory compensation for manslaughter,[94] international breaking of the fast in the month of Ramdan,[95]

---

the outstanding politicians and political philosophers. The first listing of them was by Plato in his *Protagoras*. Although these listing differed widely, they usually included Thales of Miletus, a philosopher, and Solon, lawgiver of Athens, who are most prominently remembered. Others, hardly known now, w e re Pittacus of Mitlene, Bias of Prienem Myson the Chenian, Celobulus the Lindian, and chilon of Sparta.

[91] See more details in Franz Rosenthal, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (Leiden:E.J. Brill, 1960).

[92] The Qur'anic account concerning Joseph's fate after had been abandoned by his brothers runs as follows: "And there came a caravan; and they sent forth their drawer of water, and he let down his bucket into the well-[and when he saw Joseph] he exclaimed: 'Oh, what a lucky find, this boy!' And they hid him with a view to selling him: but Allah had full knowledge of all that they were doing. And they sold him for a paltry price- a mere few silver coins: thus low did they value him" (12:19-20).CF. the Biblical account in Genesis, 37:12-36 and 39:1-6.

[93] In its approach to the problem of slavery, Islam adopted a "system [that] has a double characteristic: reduction of access to servitude and expansion of the way towards liberty." Boisard, *Humanism in Islam,* p.79. See more elaboration on this aspect in Ibn Ashur, *Tafsir al-Tahrir wa al-Tanwir*, vol. 3/5 pp.158-159.

[94] According to the following verse:

"And it is not conceivable that a believer should slay another believer, unless it be by mistake. And upon him who has slain a believer by mistake there is the duty of freeing a believing soul from bondage and paring an indemnity to the victim's relations, unless they forgo it by way of charity. Now if the slain, while himself believer, belonged to a people who are at war with you, [the penance shall be confined to] the freeing of a believing soul from bondage; whereas, if he belonged to a people to whom you are bound by covenant, [it shall consist of]an indemnity to be paid to his relations in addition to the freeing of believing soul from bondage. And he who does not have the where withal shall injurious comparison (*zihar*),[96] and the breaking of oaths.[97] In the same spirit, Islam directed slave owners to write out deeds of freedom for those in their possession if the latter so wished. Thus, the Qur'an says to this effect: "And if any of those whom you rightfully possess desire [to obtain] a deed of freedom, write it out for them" (24:33). Whether this verse implies an order or merely a recommendation is a matter over which scholars have differed. Hence, as directed by the Prophet, if someone manumits his share in a slave, the share of his partner shall be assessed and he shall pay its value so that the shared slave becomes totally free. Thus, he said: "Whoever manumits a slave owned by two masters, should manumit him completely (not partially) if he is rich, after having his price evaluated."[98]

Similarly, if a female slave gives birth as a result of sexual relationship with her master, she acquires the status of a free woman, and her master cannot sell her, or give her away to someone else, or even force her to do any hard work. After his death she must be manumitted by using his wealth.[99]

Is a similar vein, Islam aroused people's interest and encouraged them to manumit slaves. Thus, Allah Almighty says in the Qur'an: "But he would not try to ascend the steep uphill road.. And what could make you conceive what it is, that steep uphill road? [It is] the freeing of a human being form bondage"(90:11-13). Islam's encouragement of the manumission of those slaves who were expensive and beloved by their masters is even stronger. In this respect, Abu

---

fast [instead] for two consecutive months. [This is] the atonement ordained by Allah: and Allah is indeed All-Knowing, Wise" (4:92).

[95] Bukhari, Sawn, hadith 1936, p.311; 'Hibah', hadith 2600, pp.420-421; 'Nafaqat', hadith 5368, p.959.

[96] Injurious comparison or *Zihar* is the act of declaring one's wife to be sa unlawful to one as one's mother, a practice that was commonplace amongst the pre-Islamic Arabs. The Qur'an clearly condemned and abolished it. See verses 33:4 and 52:2-4.

[97] By Virtue of Allah's saying in the following verse:

"Allah will not take you task for oaths which you may have uttered without thought, but he will take you to tack for oaths which you have sworn in earnest. Thus, the breaking of an oath must be atoned for by feeding ten needy persons with more or less the same formed as you are wont to give to your own families, or by clothing them, or by freeing a human being from bondage; and he who has not the wherewithal shall fast for three days [instead]. This shall be the atonement for your oaths whenever you have sworn [and broken them]. But the mindful of your oaths! thus Allah makes clear unto you His messages, so that you might have cause to be grateful."(5:89).

[98] Bukhari, *Sahih*, "itq", hadith 2521, p.407.

[99] For more details concerning the treatment of the issue of slavery in classical Islamic jurisprudence, see Ibn Rushd, *The Distinguished Jurist's Primer,* vol. 2, pp.443-474.

Dharr narrated: "I asked the Prophet, 'What is the best deed?' He replied, 'To believe in Allah and to fight for His cause.' I then asked, 'What is the best kind of manumission (of slaves)?' He replied, 'The manumission of the most expensive slave and the most beloved by his master.'"[100]

In another Tradition, the Messenger of Allah is reported to have said: "He who has slave girl and educates and treats her nicely and then manumits and marries her, will a double reward."[101] In my view, one important aspect of the wisdom behind this Prophetic insistence on the emancipation of slaves is that these people must not remain in bondage, for this would deprive society from fully benefiting fro their talents and that freeing them is better for them.

To the other method belongs the prohibition of overburdening slaves with too much or heavy work and the obligation to provide them with food and clothing. Thus, it is reported that the Prophet said:

You slaves are your brethren, upon whom Allah given you authority. So, if one has one's brethren under one's control, one should feed them with the like of what ones eats and clothe them with the like of what one wears. You should not overburden them with they cannot bear, and if you do so, help them [with their hard work].[102]

Islam also forbade beating slaves for no reason; should someone torture his slave, the latter must be freed.[103] In the same spirit of promoting good treatment of slaves, the Prophet said : "One should not say, my slave (*abdi*), or my girl-slave (*amati*), but should say, my boy (*fatay*), my girl (*fatati*), and my young man (*ghulami*)."[104]

From a thematic analysis of these and similar teaching and disposition, we ascertain that it is an objectives of the Shari'ah to promote and spread freedom in the first meaning mentioned above. As for the second meaning, it has many forms and manifestation that constitute an integral part of the intended objectives of Islam. These forms and manifestations relate to the fundamental principles governing people concerning their beliefs, opinions, and speech as well as conduct and acts. All this can be subsumed under a universal rule by virtue of which all those living under the authority of the Islamic state must be able to act freely and deal with whatever matters the Shari'ah has allowed them to dispose of without fearing anyone. All these matters are governed by definite rule and limits established by the Shari'ah and noone can force people to abide by something else.

---

[100] Bukhari, *Sahih*, 'Itq" hadith 2518, p.407; Muslim, *Sahih*, 'Iman' hadith 136, p.52.

[101] Bukhari, *Sahih*, "Ilm', hadith 97, p.22.

[102] Bukhari, *Sahih,* Iman, hadith 30, p.8; Muslim, *Sahih*, Ayman , hadith 1661, p.652.

[103] Ibn Majah, *Sunan*, Diyyat, hadiths 2679-2680, vol.2, p.894.

[104] Bukhari, *Sahih,* "Itq", hadith 25252,p.412.

For this reason , Allah has strongly conduced those people who would try do so:

> Say: "Who is there to forbid the beauty which Allah has brought forth for His creatures, and the good things from among the means of sustenance?" Say: "They are [lawful] in the life of this world unto all who have attained to faith – to be theirs alone on Resurrection Day." Thus clearly do We spell out these messages to people of [innate] knowledge! Say: Verify, my Sustainer has forbidden only shameful deeds, be they open or secret, and [every kind of] sinning, and unjustified envy, and the ascribing of divinity to anything besides Him-Since he has never bestowed any warrant for that from on high – and the attributing to Allah anything of which you have no knowledge."(7:32-33)

The phrase " and attributing to Allah anything of which you have no knowledge" includes the prohibition of the permissible things queried at the beginning of this passage in the form of disproving interrogation (*istifham inkari*).

Likewise, Islam has established freedom of beliefs. Isla refuted all wrong beliefs which perverse people forced upon their followers without knowledge, without any guidance, and without any enlightening revelation, and also called for finding conclusive proofs for any proclaimed true faith. Furthermore, while Islam has confirmed the freedom of belief by ordering its followers to call other to Allah's path with wisdom and goodly exhortation and by arguing with them in the most kindly manner (16:126), it has also forbidden coercion in matters of faith (2:256). I have discussed this point in some detail in my book *Usul al-Nizam al-Ijtima fi al-Islam*.[105] Were it Not because freedom of belief is one of the fundamentals of the Shari'ah, the punishment for the miscreant who conceals unbelief and shows belief would not have been such that his repentance should not be accepted by Allah, for he has no excuse in doing so.

---

[105] Ibn Ashur, *Usul al-Nizam al-Ijtimaifi al-Islam* pp.159-178.

Freedom of expression (*hurriyat al-aqwal*) consist of showing one's beliefs and views within what it is allowed by the Shari'ah. Allah has ordained part of what belongs to this type of freedom in the following verse:

> In this way Allah makes clear His messages to you, so that you might find guidance, and that there might grow out of you a community [of people] who invite to all that is good, and enjoin the doing of what is right and forbid of what is wrong: and it is they, they who shall attain to a happy state.[106]

It has also been expressed in the following Tradition, in which the Prophet is reported to have said:

He who amongst you sees something abominable should modify it with the help of his hand and if he has not strength enough to do it then he should do it with his tongue, and if he has not strength enough to do it, (even) then he should (abhor it) from his heart, and that is the least of faith.[107]

Freedom of expression also includes the freedom to pursue knowledge (*taallum*), to instruct other (*talim*), to produce intellectual works, and to publish ones' views. This aspect of freedom was best manifested during the first three centuries of Muslim history, when scholars could announce their views and doctrines and argue for them openly without this causing any animosity. Indeed, this was an embodiment of the Prophet's Saying in which he started: "May Allah brighten a man who hears a tradition from us, learns it by heart and passes it on to others. Many a bearer of knowledge conveys it to one who is more versed than he is; and many a bearer of knowledge is not versed in it."[108]

It was in this spirit that Malik ibn Anas rejected a suggestion by the Abbasid caliph Abu Jafar al-Mansur to enforce his juristic doctrines as the law of the land. The caliph is reported to have said to have said to him:

"I have decided to copy your book [that is, *Muwatta*], send one copy of it to each of the regions of the caliphate, and order [the people] to abide by it and not leave it to anything else." Malik replied: "O leader of the faithful, do not do so, for people have already learnt certain views and known certain traditions, and the inhabitants of each region have adhered to one or the other of the different opinions of the companions of Allah's Apostle and others according to which their religious practice has been shaped. Preventing them from that will be hard, so leave people to their practice and to what they have chosen for themselves."[109]

---

[106] Al-Qura'n 3:103-104.

[107] Muslim, *Sahih, Iman,* hadith 78, p.42; Tirmidhi, *Sunan* (Istanbul: Dar al-Da'wah, 1413/1993), Fitan, hadtih 2172, vol.4, pp.469-470; Abu Dawud, *Sunan,* Malahim, hadith 4340, vol.2/3, p.322.

[108] Abu Dawud, *Sunan*, "ilm", hadith 3660, vol. 2/3, p.322.

Were it not for the consideration of freedom of expression, confessions, contracts, obligations, divorce pronouncements, and wills would have no legal effect. That is why these actions are ineffective once it is established that they have taken place under coercion.

Freedom of action (*hurriyat al-amal*) refers to one's management of one's personal and other's affairs. The kind of freedom relating to one's personal affairs consist of applying oneself to, and enjoining all that is permissible (*mubah*). Permissibility (*Ibahah*) is the widest domain where human freedom to act is mostly manifested. No one has the authority to prevent human beings from enjoying what is permissible, for none is kinder to them than Allah. By the permissible is meant all that is allowed in the Shari'ah even if it is expressed in general terms (*umum*), including the abominable (*makruh*).

The permissible includes, for example, the pursuit of any kind of lawful profession, settling in any permitted places, and benefiting from all natural resources such as water and pasture. It also includes disposing of one's property and earning in any lawful way, choosing any type of food, dress, or accommodation one likes, and fulfilling any lawful desires. That is why a wife can deal freely with her property without her husband's consent, notwithstanding the disagreement among the jurists over the extent of her freedom in doing so.[110]

---

[109] Abu Jafar Muhammad ibn Jariral-Tabari, *Dhuyul Tarikh al-Tabari* (volume II if his *Tarikh al-Rasul wa al-Muluk,* ed. Muhammad Abu al-Fad Ibrahim (Cairo: Daral-Ma arif, n.d.), pp. 659-660. See also al-Qadi Iyad ibn Musa al-Yuhsubi, Madarik, ed. Ahmad Bakir Mahmud (Beirut: Dar Maktabat al-Hayat; Tripolo (Libya): Dar Maktabat al_Fikr, 1387/1967), vol. I pp. 191-193.

[110] According to Abu Hanifah, al-Shafi and Ahmad ibn Hanbal, she is absolutely free to deal with all her property in whatever way she likes, 'Abd Allah ibn Ahmad ibn Qudamah, *al-Mughni,* ed. Ad Allah al-Turki et al.(Cairo: Dar Hajar, 1406/1986), vol 4, pp.513-514. This view is based on the following Prophetic Traditions on the authority of Jabir ibn Abd Allah and Zaynab (Abd Alah's wife). Jabir's report reads as follows: "O women! Give charity….. So [women] went on giving away from their jewels, thus putting their earrings and finger rings in Bilal's cloth." Muhammad ibn Ali ibn Daqiq al-Id, *Ihkam al-Ahkam Sharh 'Umdat al-Ahkam* (Cairo: Idarat al-Matbaah al-Muniriyyah, 1340), vol.2, pp.129-130. Zaynab's report, reads as follows: "O women! Give charity, even if from your jewels, " Muslim, *Sahih*, 'Zakah', hadith 1000, p.360.

Freedom of action that affects others is lawful so far as it does not cause harm to them. This kind of freedom combines a twofold objective of the Shari'ah, namely, the freedom to act that does not go beyond the actor and the freedom to act that affects someone's else's freedom to act, without however causing harm to him or her. Harm might consist of suspending someone's right or destroying it altogether. This requires the offender to compensate for the damage caused, as has been expounded by the jurists. For this reason, a person can be prevented from an act that would result in the violation of someone else's freedom, for this is a form of injustice. When one has carried out an act that has harmed another person, one is responsible for that harm and must rectify it as far as possible. If the damage is such that it cannot be rectified by financial compensation, then recourse must be had to deterrent punishment.

To freedom of action that affects other's freedom of action belong also the obligations - that is, contracts and agreements – into which people enter voluntarily for certain benefits which they envisage will be the result. Committing oneself in this way is a manifestation of the exercise of one's freedom to act whereby one agrees to grant certain rights to someone else. This has been the subject of detailed juristic discussion in relation to contracts and the distinction between those that are binding simply by the verbal creation of agreement and those that become binding only after entering into execution of the matter contracted upon.

Furthermore, the Shari'ah has placed certain obligations upon its followers, according to which their freedom to act is restricted for their own good (*salah*), both now and in the future. These obligations include the fulfillment of what relates to the public good (*furud al-kifayat*), or realizing the good of those whose well-being the Shari'ah has made the duty of specific persons, like providing for one's relatives. If people transgress the limits of their freedom in this respect, they will have to be stoppage at the limits of the Shari'ah by liability, such as compensation for negligence, or by punishment without acceptance of repentance, as in armed robbery (*harabah*), or after inducing them to repent, as in the case of apostasy (*riddah*). Examples illustrating this are abundant.

Differently from this view, the Malikis maintainced that once married, a woman could not dispose of more than one thirds of her property without the consent of her husband. See details in Ahmad ibn Muhhamd al-Dirdir, *al-Sharh al-Saghir* (Beirut: Daral-Marifah, 1398/1987), vol. 3, p.402.

You should know that the violation of freedom is one the gravest forms of justice and wrongdoing (*zulm*). Therefore, the realization and determination o the extent of people's freedom in the sight of the Shari'ah must be the responsibility of judges who are invested with the power to settle disputes between the people. That is why if a victim revenges himself on the offender, this would be considered an aggression for which he deserves to be reprimanded. Thus, Allah says in the Qur'an:

> And do not take any human being's life [the life] which Allah has willed to be sacred- otherwise than in [the pursuit of] justice. Hence, if anyone has been slain wrongfully, We have empowered the defender of his rights [to exact a just retribution]; but even so, let him not exceed the bounds of equity in [retributive] killing. [And as for him who has been slain wrongfully-] behold, he is indeed helped [by Allah]!.[111]

That is also why 'Umar ibn al-Khattab considered taking one's revenge a kind of enslavement as in the case of the son Amru ibn al-As. When Amru's son slapped someone for having trodden on his dress, and the person complained about it to the caliph, 'Umar made his famous statements: "On what grounds do you enslave people whose mothers have born them free?" True, the son of Amru was unintentionally hurt by having his dress trodden upon in such a way that it might have been dirtied or torn. However, when he undertook tor revenge himself on his offender, he went too far and treated the person who had offended him as if he were his slave. Yet, Umar did not content himself with simply making this statement, for he also content himself with simply making this statement, for he also authoriszed that person to take revenge on the son of Amru ibn al–As.[112] Imprisoning a person falls exclusively under the jurisdiction of judges, and no one else can imprison anyone else, for this is a grave violation of people's freedom, and this also applies to expulsion.

Accordingly, in many of its dispositions the Shari'ah has *guarded freedom* to act by blocking all means leading to its violation, such as forbidding compulsory authorization (*wakalah*) whereby the debtor would delegate his or her creditor is sale, etc., at the date of maturity o the debt.[113] In a similar vein, the Shari'ah has also prohibited all kinds of terms imposed by capital owners on the workers undertaking commenda (*qirad*)[114] land-tenacy (*muzaraah*), *mughrasah*, sharecropping (*musaqah*), etc.

---

[111] Al-Qura'n 17:33.

[112] See the full story of this incident in Ali ibn Husam al-Din al Muttaqi al-Hindi *Kanzl Ummal fi Sunan al-Aqwak wa al-Afal* (Beirut: Dar Ihya, al-Turath al-Arabi, 1410/1990), vol. 4, p.420; Muhhamad Yususf al-Kandahlawi, *Hayat akk-Sahabah*, ed. Nayifal al-Abbas et. al (Damascus: Dar al-Qalam, 1388/1968), vol.2, p.97.

Shari'ah is About Essences and Real Attributes, Not Names and Forms

The purpose of the Shari'ah in all its rules and injunctions is to associate the genera of those rules and injunctions with states, attributes, and actions in human conduct, both individually and collectively. This association is based on the essential meanings *(ma'ani)* of those states, attributes, and actions resulting in righteousness and benefit or unrighteousness and harm, be they strong or weak. Likewise you should beware of the wrong belief that some rules and injunctions are linked merely to the names of things or to their external forms without consideration of the essential meaning intended by the Shari'ah *(ma'ani shar'iyyah)*, thus falling into grave error in fiqh.

One should therefore avoid imitating some jurists who forbade the consumption of the porpoise, which some people call sea swine, because they considered it as swine, as they say. One should also shun some jurists who forbade the simultaneous marriage of two men and two women on the basis that this practice is what is known as *shighar*,[3] simply by looking at it's apparent form resembling that of *shighar*: a man married a woman under his guardianship to another man for a given dower, while the other man married a woman under his guardianship to another man for a given dower, while the other man married a woman under his guardianship to the first man for a given dower (that was or was not equal to that of the first woman). Such jurists failed to realize the real reason and proper attribute for which the Shar'ah has forbidden the *Shighar* marriage.

Thus, it is the jurist's duty to examine carefully the original names of things and the variations taken into account during the time of Revelation. They constitute an appropriate way to know the contemporary circumstances observed by the Shari'ah so that we can be guided by that knowledge to the attribute considered by the Lawgiver as a basis for the *hukm*. We shall elaborate on this point in the discussion of the characteristics of precision (*dabt*) and determination (tahdid) in Islamic legislation. It is in this context that some jurists fell in many errors, such as issuing the legal opinion (fatwa) upholding the death penalty for charlatans because they call them sorcerers, thus totally ignoring the real meaning of sorcery or if asked about it, jurists ought to explain and distinguish carefully its real properties and essence. They should not hasten to issue legal verdicts based merely on the name sorcery (*sihr*), thus deciding that the sorcerer must be put to death and his repentance cannot be accepted, for this is indeed very grave.

---

[113] See in this respect Ibn Rushd, *The Distinguished Jurist's Primer,* Vol. 2, pp. 286-287.

[114] *Qirad or mudarabah* is a partnership contract based on the sharing of profit. It consists of "the giving of wealth [*mal*] by one person to another so that he may trade with it (in return) for a defined ration of the profit that the worker(*amil*) earns, that is, a part that is agreed upon by both." Ibn Rushd, *The Distinguished Jurit's Primer,* vol. 2, p.284.

Equally mistaken were other jurists who issued the fatwa proclaiming the prohibition of the smoking of tobacco, which became known in the early twelfth [eighteenth] century under the name of *hashish.* Those jurists thought that tobacco was the same as the drug hemp used by hashish addicts. Equally erroneous was the fatwa issued by some juristic scholars prohibiting the consumption of the Yemenite beans known as coffee when it was discovered at the beginning of the tenth/sixteenth century, because of its name, *qahwah*, which means applied applied to the beans, was actually a corruption of the non-Arabic [French] word cafe.

Therefore, jurists have always sought to distinguish the attributes taken into account by the Lawgiver from those that are merely associated with them but have nothing to do with the purpose of the Lawgiver. They call these associated attributes co-present properties (awaf tardiyyah), even though they might constitute a dominant aspect of the real meaning (haqiqah shar'iyyah) intended by the Shari'ah, such as that which takes place in the wilderness in the case of armed robbery and brigandage (hirabah). Although it might be true that armed robbery mostly takes place in the countryside and wilderness, it is not what the Lawgiver has intended. Accordingly, adept jurists decided on the penalty (hadd) for armed robbery for criminals using arms and frightening the public in urban areas.

Therefore, Islamic legal terms (asma' shar'iyyah) should be interpreted only according tot he meanings intended by the Lawgiver concerning practices designated by those terms when Islamic terminology was established. When the designated practice changes, then the terms has no value in itself. This is why Maliki jurists held the view that legal forms expressing voluntary donations (tabarru'at) might interchange. Thus, *'umra mu'aqqabah* becomes endowment; endowment with conditions of sale becomes life-grant (*'umra*), a charity with the right of the donor to buy it back turns into a gift, and donation subject to the donor until his death is transferred into testament, even though it might be called endowment, gift, or life-grant (*'umra*). They also stated that if the guardian of a woman said to a man, "I donate to you such as a dower," this would be an expression of marriage, even though he has called it gift (*hibah*).

Indeed, the Prophet warned severely and disapprovingly that some of his community would consume intoxicants and call them by another name. Likewise, just as a alteration of names has no effect in legalizing what is forbidden, so too it has no effect in terms of prohibiting what is lawful. More generally, name is themselves cannot be the reasons for the Shai'ah injunctions. Rather, they identify practices with specific attributes on which the injunctions are based. Accordingly, it is those attributes which are important. An example is the Prophet's ban on preparing non-alcoholic drinks in containers such as *hantam* (water-skins), dubba' (green jars), and *muzaffat* (jug smeared with pitch), because drinks in those containers ferment rapidly, not because of their names.

Precision and Determination in Islamic Law

tion from hardship that the Shari'ah does not seek to burden human beings. One the the characteristics of the ShaI have already shown that one of the most important characteristics of the Shari'ah is associating its ordinances with specific meanings. To that I should add the following. Since the Shari'ah has intended its ordinances to be easily implemented by the people under all circumstances, it has also included precision (*dabt*) and determination (*tahdid*) so that its meanings are clearly understood. Likewise, it has established those attributes as indicators (*amarat*) to the scholars of the meanings underlying the legislation. For ordinary people, it has used clear-cut terms (*hudud*) and precise measures (*dawabit*) encompassing those meanings that might be beyond their grasp. These terms and measures are a suitable guide for scholars when the deeper meanings implied by those attributes are unclear. They are also necessary for non-scholars to increase their understanding of the deeper meanings and ambiguous attributes intended by the legislation and encapsulated by those terms and measures. Therefore, knowledge of all that has been mentioned in indispensable to anyone seeking to know *Maqasid al-Shari'ah.*

This is, indeed, a subtle point that has escaped the attention of many jurists. Malik highlighted this in a statement in *Muwatta'* concerning the transaction called *khiyar al-majlis*. He mentioned the Tradition narrated by Abd Allah ibn 'Umar, in which the Prophet reported to have said: "Both parties in a business transaction have the right of withdrawal as long as they not separated, except in the transaction called *khiyar* (choice)." Then he made the following comment: "There is no specified limit nor any matter which applied in this case according to us." He meant that it was difficult to rely on this report as a basis for legislation on the transaction called *khiyar*, since there is no specification in it of the *majlis* nor is there any practice to clarify it. Moreover, the *majlis* is undetermined, for both parties might be on board ship or in a vehicle, etc.

Therefore, when applying *qiyas*, the jurists focus their whole attention on the evident and regular attributes as the basis of the Shai'ah ordinances and provisions. None the less, they also explicitly acknowledge that the existence of those attributes indicated the underlying meaning that may be called wisdom (*hikmah*), *maslahah* or *mafasdah*. Anyhow, the Shari'ah categorically avoids imprecision in its provisions and ordinances, for this is a characteristic of the rule of pagan ignorance (*Jahiliyyah*), against which God has warned us in the following verse: "Do they, perchance, desire [to be ruled by] the law of pagan ignorance?" (5:50)

Under that regime, the management of people's affairs was based on mere impressions arising from circumstances, such as, for example, divorce and *raj'ah*, which had no specific terms or limits. It was a practice that the Qur'an clearly condemned in the following verse: "but do not retain them [that is, women] against their will to hurt [them]: for he who does so sins indeed against himself" (2:231). The same is also true of the division of inheritance. In this respect, Judge Isma'il ibn Ishaq mentioned that people in the age of pagan ignorance never gave wives and daughters the inheritance rights that Islam has given them, nor did they have any definite rules of inheritance that could be observed. The same applies to polygamy and the confirmation of lineal attribution (*luhuq al-nasab*).

Only very few instances can be excluded from this general state of affairs, such as the amount of blood money for both members of the elite (*khassah*) and the general public (*ammah*). Thus, the amount of blood money for an ordinary person used to be one hundred camels, whereas that of an aristocrat was double or even more which they called *takayul*. When Islam come with its Divine provisions and rules, it totally abolished the chaos in all aspects of life by exclusively adopting a method of precision and of determination. Therefore, the Shari'ah has ordained its followers to abide by its terms and limits (*hudud*). Hence, if a person performs the noon prayer (*zuhr*) before midday, it will not be valid. From a thorough survey of the ways and means used by the Shari'ah to achieve precise determination, I have found that they include six methods.

1. The first method is to define essences and meanings clearly in order to prevent any confusion. Thus, each meaning is explained in detail,

together with its properties and effects, such as specifying the levels of kinship that qualify of inheritance or the prohibition of unmarriageable kin. Only these consideration are taken into account, barring all other irregular and indefinite considerations, like love friendship, benefit, or adoption, whatever degrees. The Qur'an says: "As for your parents and your children you know not which of them is more deserving of benefit from you: [therefore this] ordinance from God. Verily, God is All-Knowing, Wise" (4:11), "so, too, has He never made your adopted sons [truly] your sons: these are but [figures of] speech uttered by you mouths – whereas God speaks the [absolute] truth: and its is He alone who can show [you] the right path." (33:4). It is also reported in an authentic Tradition that when the Prophet asked Abu Bakr for 'A'ishah's hand in marriage, Abu Bakr said: "But I am your brother!" The Prophet said, "You are my brother in God's religion and His Book, but she ['A'ishah] is lawful for me to marry." This category also includes the link between the consumption of wine and slight drunkenness, regardless of whether the wine is made from grapes or dates.

The phrase "to prevent any confusion" and be explained as follows. Confusion is present for the clear-sighted jurist experienced in distinguishing the properties of legal essences (*mahiyyat shari'yyah*). although some people might be confused over certain essences sharing similar properties. This is illustrated by the following Qur'anic verse: "for they say, 'Buying and selling is but a kind of usury – the while God has made buying and selling lawful and usury unlawful" (2:275). Selling and usury might look the same at first sight, for both of them consist of financial transactions meant for profit, especially when selling includes deferment. Therefore, God indicated by the expression "the while God has made buying and selling lawful and usury unlawful" that He allowed one and prohibited the other only because of their different essences and properties. Thus, selling consists of a transaction between two parties entailing an exchange by both sides, whereas usury is a transaction affecting only one party, that is the lender to satisfy the need of he borrower. As a result of this distinction, seeking profit has been allowed for the parties engaged in selling, whereas it has been for bidden in loan contracts to seek any profit. The alternative to usury is that either one should lend money simply for the sake of fulfilling someone else's need or keep one's money.

2. The second method consists of mere correspondence between the name and the named, such as associating the canonical punishment (*hadd*) for the consumption of intoxicants with one single drink of wine. This is because if the punishment was made conditional upon the actual effect of the intoxicant (*iskar*), it would be subject to much irregularity and indeterminacy. Susceptibility to intoxication varies greatly from one person to another, thus resulting in difficulty and confusion in implementing the penalty.

   On the other hands, if the punishment was applicable only to the utmost degree of drunkenness, that is, overwhelming intoxication, serious harm would result before that state was reached. This equally applies to linking the validity of selling fruit to reddening and of dates to yellowness. it is also true of making the payment of the rest of the dower conditional upon the consummation of the marriage with the wife and making contracts binding by the offer and acceptance formula uttered by the different parties.

3. The third method consists of specifying amounts (*taqdir*), such as specifying the minimum level (*nisab*) of cereals and money, etc. for liability to pay zakah, limiting the number of wives in polygamy, setting a limit for divorce, determining the value of stolen goods for the implementation of the theft penalty (*hadd*) according tot he juristic view upholding the minimum scale (*nisab*) for this crime, fixing the minimum amount of dower, and determining a maximum distance of 12 miles between the home of the infant's guardian and that of the nurse according to Maliki jurists.

4. The fourth method is timing, such as the elapsing of one year for the payment of zakah on money and property, the rise of Pleiades for the zakah on cattle, four months for forswearing one's wife (ila'), one year for the revocation of marriage in the case of certain defects, two months for the inability to provide maintenance for one's wife, four months and ten days for the waiting-period of a widow, and the elapsing of one year for the prescription of the right of pre-emption.

   Some of our scholars maintained the view of not giving credence to a woman in her waiting-period (mu'taddah) if she asserts that it is less than forty-four days. Indeed, Ibn al-Arabi held that a waiting-term of less than three month should not be accepted, a view that became the rule of thumb amongst the people of *Ifriqiyyah* (Tunisia) out of concern for precision.

5. The fifth method is to specify the properties determining the meaning of the things contracted upon, such as specifying the kind of work in hire and requiring a dower and a guardian for a valid marriage to distinguish it fro adultery.
6. The sixth method consists of inclusion (*ihatah*) and determination. Examples are the requirement for the cultivation of a wasteland (*ihya' al-mawa*) is that is should be so far from the village or city that the latter's smoke cannot be seen from it'; the prohibition of logging the sanctum of Makkah (*haram*); and the stipulation that property should be kept in a safe place (*hirz*) to differentiate theft from pilferage (khilsab).

The Merciful Nature of the Shari'ah

It has been conclusively established in our detailed discussion of the magnanimity of the Shari'ah and its dissociari'ah is that it is practical law seeking the realization of its objectives for both the community and private individuals. Therefore, it is most important that its objectives should be achievable, which can happen only by applying leniency. Accordingly, I consider that avoiding sheer vindictiveness in legislation is a major characteristic of the Law of Islam.

Thus, it has been mentioned in the Qur'an that God had imposed some punitive laws on certain nations:

فَبِظُلْمٍ مِّنَ ٱلَّذِينَ هَادُوا۟ حَرَّمْنَا عَلَيْهِمْ طَيِّبَٰتٍ أُحِلَّتْ لَهُمْ
وَبِصَدِّهِمْ عَن سَبِيلِ ٱللَّهِ كَثِيرًا ﴿١٦٠﴾

وَأَخْذِهِمُ ٱلرِّبَوٰا۟ وَقَدْ نُهُوا۟ عَنْهُ وَأَكْلِهِمْ أَمْوَٰلَ ٱلنَّاسِ بِٱلْبَٰطِلِ ۚ وَأَعْتَدْنَا
لِلْكَٰفِرِينَ مِنْهُمْ عَذَابًا أَلِيمًا ﴿١٦١﴾

> So, then, for wickedness committed by those who followed Judaism did We deny to them certain of the good things of life which [earlier] has been allowed to them; [We did this] for their having so often turned away from the path of God, [for] their taking usury although it had been forbidden to them, and their wrongly devouring of other

> people's possessions. And for those of them who [continue to] deny the truth, We have prepared grievous suffering. [115]

There is here clear indication that the prohibition of certain good things for the Israelites was a punishment for them owing to their indulgence in disobeying the Divine law reveled to them.

Likewise, when Islam authorizes a practice or relaxes its legislation, it actually runs according to its manifest characteristic of magnanimity. And when it applies restriction or modifies a rule from permissibility to prohibition, etc., in in fact considers the god of the people and their gradual progress on the path of reform in a gentle manner. accordingly, Islam intended the prohibition of intoxicants from the beginning of the Prophet's mission. However, it was silent about f for a certain period so that intoxicants were allowed, and then forbidden during prayer time. This was a gradual preparation for its complete prohibition.

Therefore, deterrents (*zawajir*), sanctions, and categorical penalties (hudub) can be seen only as aiming to reform the condition of human beings by using necessary measures to attain what is beneficial for them, neither more nor less. This is because if what is less is sufficient to achieve their good, the Shari'ah would not have exceeded it. Similarly, if the penalties established by the Shari'ah transgress the limits of required punishment, its purpose would be sheen vindictiveness rather than reform. This is why most of the Shari'ah penalties are corporal, meant to cause physical pain; for this type of pain is felt by everyone. In contrast, financial penalties are not common in the Shari'ah, except as compensation for injury (*ghurn al-darar*).

Thus, if offenses are committed for which there is no specific penalty established by the Shari'ah and whose motive is the love to accumulate more wealth, then it is very likely that the *mujtahid* will impose a financial penalty, such as confiscation. An example is when 'Umar ibn al-Khattab ordered Ruwayshid al-Thaqafi's house be reduced to ashes as a punishment because he was using it as a tavern in which he used to gather drinking companions to drink intoxication liquors. Likewise, Yahya al-laythi reported tat Malik's opinion was to torch the wine merchant's house. It is also stated in *al-wadihah* that Malik held the view that any house used as a shelter for people of debauchery must be confiscated and sold. However, Ibn al-Qasim's position is contrary to that of Malik on both issues.

---

[115] Al-Qura'n 4:160-161.

Of the penalties oscillating between vindictiveness and ordinary punishment regarding the motive of the offense, is the juristic view maintaining the absolute and permanent prohibition of a woman to the man who has consummated the marriage with her while still in her waiting period (*'iddah*). 'Umar ibn al-Khattab's adjudication was based on this view, and it was maintained by Malik. However, some shcolars of Islamic jurisprudence were of the view that the marriage contract should be annualled, although they did not uphold the view of permanent proscription – which is more acceptable. Therefore, some Maliki jurists, when judging this kind of case, preffered to impose and annulment without making it an ablsolute and permanent proscription. The reason is that maybe their affair will run properly according to the view that does not uphold the permanency (*ta'bid*) of prohibition. Of the same kind is the question of a man eloping with a married woman.

This cannot be disputed on the basis of what has been reported in *Sahih al-Bukhari* on the authority of Abu Hurayrah that when the Prophet knew that some of the Companions were practicing wisal (continuous fasting), he forbade them to do so. So, one of the Muslims said to him, "But you practice *wisal*, O God's Apostle!" The Prophet replied, "Who amongst you is similar to me? My Lord gives me food and drink during my sleep." So, when the people refused to stop wisal, the Prophet fasted day and night continuously along with them for a day and then another day. Then they saw the crescent moon (of the month of Shawwal). The prophet said to them (angrily), "If it (the crescent) had not appeared, I would have made you fast for a longer period." That was a punishment for them when they refused to stop practicing continuous fasting.

This specific act of the Prophet was not, however, meant was not, however, meant as universal legislation, but a measure for educating his Companions. Thus it was kind of advice to his Companions, not a general legislative rule.

The Shari'ah's Aim in Building a Solid and Stable Social Order

That the main objective of the Shair'ah is to establish a strong community with a stable social system and promote the orderly functioning of its affairs by achieving its welfare and preventing evil is so obvious that not the slightest doubt about is should arise in the mind of any thinking person. All Muslim jurists and Shari'ah scholars realized this regarding the welfare of individuals, although they failed to demonstrate it for the welfare of community as a whole. Nevertheless, none of then will deny that if the welfare of individuals and the proper management of their affairs is intended by the Shari'ah, then the same applied to the community as a whole is even more important. Is it not true that the righteousness of the part is the way to achieving the righteousness of the whole? Is it not true that a sound whole can be comprised only of sound parts, just as good spears can only be made of strong wood? Therefore, if it is supposed that the aggregate of righteous individuals will be a corrupt whole, this mean that such righteousness can only vanish like a candle in the wind.

Therefore, God has reminded Muslims as well as other righteous communities of the favors that He bestowed upon them by establishing them no the earth and made their condition good. Thus, He says: "God has promised those of you who have attained faith and do righteous deeds that, of a certainty, He will cause them to accede to power on earth, even as He caused [some of] those who lived before them to accede to it" (24:55); "as for anyone - be it man or woman – who does righteous deeds, and is a believer withal – him shall We most certainly cause to live a good life" (16:97). Addressing the early Muslims, He says: "And remember the blessings which God has bestowed upon you: how, when you were enemies, He brought your hearts together, so that with His blessing you became brethren" (3:103). He also said: "However, all honour belongs to God, and [thus] to His Apostle and those who believe [in God]: but of this the Hypocrites are not aware" (63:8). Accordingly, we need to imagine the Muslim community as one individual Muslim and subject its conditions to the rules of the Shari'ah just as we do for individuals. This will certainly provide us with clear insight into how Islamic legislative rules should apply to public affairs of the community.

One of the most important things that must never be forgotten when considering the general the general social condition of the community in light of the Shari'ah is the notion of license. The jurists, however, confined themselves to discussing and illustrating it only with regard to the individuals, They ignored the fact that the whole community might also face social hardship thus requiring the implementation of this principle as we have already explained in chapter 26 on *rukhsah*. It must be pointed out that the blocking of means and the consideration of textually unregulated interest (*maslaha mursalah*) are no less important than the rule of license. It is one of the essential characteristics of these two notions that they concern the whole of the community and rarely apply to individuals.

CHAPTER 6

Determining the Meaning of Fiqh

In the Arabic language the word *'fiqh'* means understanding, intelligence, and discernment. In the same meaning this word has been used by the Prophet Moses (peace be on him) in his prayer which he had addressed to Allah after he had been blessed by Allah with the office of apostleship near the mount of the Senai. The Holy Qur'an has reported this prayer in the following words:

وَٱحْلُلْ عُقْدَةً مِّن لِّسَانِى ﴿٢٧﴾

And untie the knot from my tongue[116]

يَفْقَهُوا۟ قَوْلِى ﴿٢٨﴾

That they may understand my speech.[117]

Rejecting the message of the Prophet Shuaib his people addressed him as:

قَالُوا۟ يَـٰشُعَيْبُ مَا نَفْقَهُ كَثِيرًا مِّمَّا تَقُولُ

"O Shuaib ! we do not understand most of what you say. [118]

The Qura'n says:

لِّيَتَفَقَّهُوا۟ فِى ٱلدِّينِ

So that they develop the understanding of Religion.[119]

---

[116] Al-Qura'n 20:26.

[117] Al-Qura'n 20:27.

[118118] Al-Quran, Hud: 91.

[119] Al-Quran, At-Tawbah: 122.

For Abdullah bin Abbas (may Allah be pleased with them) the Holy Prophet had prayed in the following words.

اللهم علّمه الدين وفقهه فى التاويل۔

> "O Allah! Grant him the knowledge of religion blessed him with the understanding of taweel.[120]

Faqiha means *fahima* (understanding).

Faquha (past tense of the same root with slight difference) means to gather knowledge. Faqhihul Arab is equal to the alim al-Arab (alim man with great knowledge especially of the religion of Islam).

To Abu Ishaq al-Muruzi fiqh is applicable to under standing of only deap things. This definition excludes the under standing of apparent things. The correct view point however, is that the term fiqh includes the understanding of both deep apparent things. This Arabic usage also of the Quran's establish this fact beyond doubt.

Earlier General Meaning of Fiqh

The term 'ilm (knowledge) also has the same literal meaning as fiqh. During the time of the prophet there appears to be no difference in the two terms. Later, as sophistication crept in, the term 'ilm came to be applied in a narrow sense to mean knowledge that come through reports, that is, traditions: ahadith and athar.[121]

The terms fiqh, on the other hand, came to be used exclusively for knowledge of the law. Thus, the concepts ilm and fiqh were separated when specialization in law and traditions came into existence toward the end of the first century of the Hijrah.[122] During this period the word fiqh also include the meaning of the term kalalm within it. These two terms were not separated till the time of al-Mamun (d.218 A.H.). fiqh till such time embraced oth theological problems and legal issues.[123] It is for this reason that Abu Hanifah (d.150 A.H.) defined fiqh as:

---

[120] Lisanul Arab, Bukhari with Fathul Bari Vol. P. 244.

[121] *Ahadith* is the plural of *hadith*. The term *hadith* is used for reports from the Prophet, while *athar* is a report about a precedent laid down by a companion.

[122] See, e.g., Ahmad Hasan, The Early Development of Islamic Jurisprudence (Islamabad, 1970) 4. "It is to be noted that 'ilm from the very beginning carried the sense of knowledge that came through an authority it may be Allah or the Prophet."Ibid. 5.

> A person's knowledge of his self and his duties.[124]

The definition is very wide and includes elements that part of the subject of kalam, like the tenets to faith ('aqa'id).

This definition was formulated to mean al-fiqh al-akbar or fiqh its wider sense. When the subject of kalam was introduced by the Mutazilah during the time of al-Ma'mun, the term fiqh canie to be restricted to the corpus of Islamic law alone. Fiqh in this restricted meaning is sometimes called al-fiqh al-asghar in order to distinguish in from the wider definition given by Imam Abu Hanifah. It is in this from the definition given below.

Shift in the Definition of Fiqh

The term Fiqh was defined later by the Shafi jurists in a very narrow technical sense. The definition is attributed by some to al-Shafi,I himself.[125] The Shafi'is define fiqh in its technical sense as follows:

> It is the knowledge of the Shari ahkam (legal rules), pertaining to conduct, that have been derived from their specific evidences.[126]

Analysis of the Definitions of Fiqh

Each word used in the definition affects the required meaning and sharpens our understanding of the term defined by excluding categories from the specified genus.[127]

It is knowledge. The first segment "fiqh is knowledge" identifies the genus (jins) we are dealing with. The use of the tern al-ilm (knowledge) brings into our vision

---

[123] Ibid. 3.

[124] See Sadr al-Shariah (d.747 A.H./1346 C.E.), al-Tawdih fi Hall Jawamid al-Tanqih (Karachi, 1979), 22.He adds the word *amalan* (for conduct) to this definition to make it conform to the narrower meaning.

[125] See Whabah al-Zuhayh, Usl al-Fiqh al-Islami, vol.1 (Techran: Dar Ihsan, 1997), 19.

[126] The term *adillah tafsiliyyah* has been intentionally translated here to mean specific evidence rather than the usual translation "detailed proofs," which is likely to confuse the reader. It is the specific evidences that are referred to in the definitaion, as distinguished from the general evidences or the *adillah* ijmaliyyah.

[127] For an analysis of the definition see Sadr al-Shariah, al-Tawdih, vol. 1, 26-28; see also Al-Zarkashi, al

the entire field of knowledge, whatever its source or origin. If the definition were restricted to this segment alone, fiqh would mean all and any kind of knowledge. In this sense the meaning would conform to its literal application.

Knowledge of *ahkam*. The wide meaning of knowledge is qualified or restricted by the use of the word ahkam (rules), which excludes from the definition of fiqh all kinds knowledge that do not pertain to ahkam or rules.

Knowledge of the *shariahkam*. This meaning is narrowed down further by the term *shari* and the domain of fiqh is confined to the knowledge of the *shari ahkam* and the *ghayr shari ahkam*, that is between legal rules and rules that do not pertain to the law.[128] The *ghayr shari ahkam* are of three types:

1. Those that are rational, like 2+2=4, or the rule that the sum is greater that its parts;
2. Those that are perceived by the senses, like fire burns or wood floats on water; and
3. Those that are discovered through experience, like aspirin cures headache.

Those rules, and their like, are not shari ahkam. In other words, they are the ghayr shari ahkam (non-legal rules) that do not form part of the shariah. As compared to this, the shari ahkam are of two types;

1. The ahkam relating to belief (itiqad), like the existence of Allah, His oneness, the truth of the mission of the Prophet. (Peace be on him), belief in the day of judgment, and so on;
2. The ahkam relating to acts (a'mal). These are divisible further into three types:
    - Those that pertain to physical acts, like the acts of prayer (salah), or those constituting willful homicide (qatl 'amd);
    - Those that take place with in the qalb, like intention, love, hate, or jealousy; and
    - Those that pertain to speech, like recitation during prayers, or offer and acceptance in a contract.

Ahkam Amaliyyah. The word used next in our definition is al-amaliyyah. It qualifies the meaning of ahkam and restricts it to those that pertain to acts (physical, of the qalb, or speech). The use of this word excludes, from the meaning of fiqh, the knowledge of the ahkam with respect to belief. This excluded knowledge is confined to the discipline known as ilm al-kalam.[129]

---

[128] The term *ghayr shari* does not necessarily mean illegal, as it might sometimes imply in Urdu, but those rules which do not fall within the ambit of fiqh or shariah.

Fiqh, then, is knowledge of the shari ahkam that pertain to conduct. This includes physical acts, acts of the qalb, and acts of the qalb, and acts arising above. This qualification also distinguishes the technical meaning of fiqh from the meaning of al-Fiqh al-akbar defined by Imam Abu Hanafi and mentioned above.

Ahkam Muktasabah derived rules. The definition is further qualified by the use of the word al-muktasabah, which means derived or acquired. The employment of this word excludes from the definition of fiqh the following types of knowledge about the shari *ahkam*:

1. Knowledge of these *ahkam* that rests with Allah Almighty
2. Knowledge of the *ahkam* granted to the Prophet; [130]
3. Knowledge of the *ahkam* granted to Jibril (Gabriel).

These three types of knowledge are not acquired or derived (their source is different) and, therefore, are not included in the definition of fiqh. On the other hand, there are two types of knowledge that are acquired: the knowledge of the jurist (faqih) and the knowledge of the layman (muqallid).

Acquired from the Adillah Tafsiliyyah. At this stage the definition is qualified further with the phrase *adillah tafsiliyah* or specific evidences. The specific evidences are primarily individual texts, whether of the Quran or of the Sunnah. As stated above, the definition so far, includes two kinds of derived or acquired knowledge; the acquired knowledge of the faqih and the acquired knowledge of the muqallid (layman). The use of the term adillah tafsiliyah excludes, from the definition of fiqh, the knowledge of the layman of muqallid. The reason is that the layman does not acquire his knowledge of fiqh from the faqih, just as in the law, the layman get his knowledge of the law from the legal expert.

---

[129] Al-Zarkashi, al-Bahr al-Muhit fi Usul al-Fiqh, Vol. 1, 22.

[130] The jurists discuss a situation where the Prophet may be considered to have exercised ijthad. This, in their view, may affect the binding force of such a ruling. It does not appear to be a very useful distinction, as it would be difficult to separate it from the sunnah.

What about reasoning from general evidences? This definition insists that law or fiqh be derived from specific evidences. Does these meaning exclude general principles? A general principle is general evidence and includes within it a number of specific evidences. This problem is explained below (see page 26). Here it is pertinent to not that this definition has been provided by the Shafi jurists and is in line with their somewhat strict methodology.

Conclusion: The definition of fiqh explained above began by first encompassing all knowledge within it, and then systematically excluded those types of knowledge that do not form part of fiqh, to give us a precise definition of fiqh. The final form of the definition declares fiqh to be the knowledge of the rules of conduct that have been derived by the juris form specific evidences found in the Quran and the Sunnah as well as other specific evidences in ijma and qiyas in other words, fiqh is a knowledge or understanding of Islamic law; it is not the law itself.

Distinction Based on the Definition

The definition leads to the following distinctions;

Distinction between Shariah and Fiqh

There is a difference between the meaning of the terms shaiah and fiqh yet, these tow terms are ofter used interchangeably. The definition, however, indicates that the term shariah as a wider meaning than fiqh. The term shariah includes both law and the tenets of faith, however, is that shariah is the law itself, while fiqh is knowledge of that law its jurisprudence.

CHAPTER 7

THE MEANING OF QANUN (LAW)

"*Qanun*" is a word of Greek origin, [131]that came into Arabic through the Syriac language;[132] it originally meant "ruler", later it connoted "a principle", and today it is used in European languages to mean canon law. In Arabic qanun means the "measurement of everything".[133] From this meaning the general use, denoting any law, lato sensu, was derived. So one can say, "The laws (qawanin) of health" and "the laws of nature", etc.[134]

Muslim jurists seldom used this word in its technical meaning; instead they used words such as *shar*, Shariah and *hukm shar'* (the first two meaning law, the third meaning a legal rule). The word "*qanun*" has now three meanings.

The first and the most general, denotes a code or a collection of legal rules. So one says: "The Ottoman Penal Qanun", "The Lebanese Qanun of Obligations and Contracts", etc.

The Second meaning refers to *Shar'* and Shariah (law)[135] in general as one would say "English law" or "the study of law", etc. The words "Shar" and "shriah" in Arabic are derived from Shar, meaning "Lawgiver", i.e. God, Whose divine word is the first source of Islamic law, as will be explained later.

Lastly, the word "*qanun*" is applied specifically to any general and obligatory rule of conduct.[136] So one would say, for example, "The Chamber of Deputies promulgated a *qanun* (law) forbidding monopolies etc. *Qanun* in this sense refers to civil dealings but does not touch upon *'ibadat* (that part of Islamic law dealing with a man's duty towards God). This differs with the principles of Islamic jurisprudence which include both the religious and the judicial rules.

---

[131] Ibn Khaldun, Muqaddimah, 35 162-63, 314.

[132] Zabidi, Taj al-Arus, IX, 315, states that qanun is originally Roman (Greek) or Persian. Bustani in Muhit al-Muhit states that the word is of Syriac origin. Actually the word is originally Greek ad was taken into Arabic like other Greek loan words through the Syriac.

[133] Ibn Manzur, Lisan, VII, 229, and al-Firuzabadi, Qamus, II, 269. The word is also used for a certain Oriental musical instrument.

[134] Ghazzali uses it in this sense when discussing al-hadd laws; Mustasfa, I, 8.

[135] As in Latin *jus*, English law, French droit, and German Recht.

[136] As in *lex, a law, loi, Gesetz*. *Qanun* was used in this sense by Ibn Jazzi in his Qawanin.

Again, in this sense *qanun* is obligatory, and has the governmental sanction. It is, further, general in application, unlike the decision of a judge which applies to a specific matter or a specific person; it is, therefore, promulgated for all people or for a group among them, without differentiation or specification.

The word "*qanun*" was frequently used during the Ottoman regime connoting laws promulgated by the State in contrast to the rules derived from the shariah, especially if judgment on the same case was different in qanun from what it was in shar. For example, usury is prohibited by shar, but interest is permissible in qanun.

The word "shariah" has also been used in this sense, as is illustrated by the word "shariah" al-Islam" (a famous book in Shiah jurisprudence) meaning Islamic laws (qawamn). Again the Muslim doctors of the science of sources used the word "hukm" to mean a sharai law, and the word "al-hakim" to mean the lawgiver.[137] Al this will be briefly explained below, together with the definition of the science of sources and the science of sources and the science of jurisprudence.

The science of sources and the legal (sharai) rule

The science of sources is the science that deals with the sources of shariah and the methods of extracting rules from them. Its subject, therefore, is these rules and sources of the shariah.

The shari sources are the sources of Islamic jurisprudence. There are four sources that are agreed upon: the Qura'n, the sunnah (traditions of the Prophet), and consensus of opinion and analogy, which will be explained in a later chapter.

The shari or legal rule is, according to the doctors of the science of sources, the communication of the lawgiver which carries a legal meaning and in it the people, to which it is directed, are charged with obeying his orders, whether it be as a direct order, a choice between alternatives or as a consequence to their own actions.[138] As one readily sees, this is a definition which does not differ greatly from the definition of qanun explained above. That is why the general principle that is to be found in al-Majami (by Khadimi) says "the rule is applicable to the group, not to individuals",[139] meaning it is like qanun, of general application, and was not laid down for a specific person or a specific situation.

---

[137] *Al-hakim* has other meanings today. It is used, for example, to denote a senior administrative officer, e.g. Hakim Lubnan (the Governor of Lebanon), or hakim al-sulh (judge or qadi; also, al-hukm (judgment, sentence), and al-mahkamah (the law court).

[138] Amidi, Ihkam, I, 49.

The legal (shari) rule presupposes the existence of the "legislator", the question to be judged, and a person over whom the judgment is to be passed. The "Legislator" is God, because He is the primary source of legal rules in Islamic jurisprudence. The question to be judged is the action to which the legal rule is related. The person on whom judgment is to be passed is the person charged with obeying the law. It is required that this person be of sound mind and be capable of being responsible before the law, for there are many factors that may affect this capacity. These are either of divine origin in which man has no choice, such as infancy, lunacy, idiocy, sleep, sickness, death, and forgetfulness, or are determined by a person's action, such as drunkenness, joking, levity, prodigality, mistake, ignorance, journeying and duress.

The legal rule again is of two kinds: the mandatory (takhfi) and the declarative (wadi). The mandatory rule requires a certain action or provides a choice of whether to follow it or not Actions, in this respect, are divided into those that are obligatory, commendable, permissible, disapproved, or forbidden. The obligatory is that act which is required by the shar; one is censured for not performing it. The forbidden is that which the shar prohibits, and one is censured for it. The commendable is that act which is required by the shar, but one is not censured at all for not performing it. The disapproved is that which the shar requires not to be done, but one is not censured for it. Lastly, there is the permissible which a person may or may not do without censure.[140] For example, in the verse "Whereas God permitted buying and selling and forbidden usury"[141], sale is a mandatory rule of the permissible category while usury is a mandatory rule of the forbidden category, etc.

The declarative rule, however, is the rule which has been promulgated as a person, a condition or a deterrent for actions or which states whether these actions are valid or void, or whether they are allowed by license or are possible ab initio. Here are some examples:

It has been laid down that murder is reason for punishment. This means that punishment is the declarative rule for the action of killing, because the killing is reason for it. Likewise, the delivery of the thing sold is considered to be a condition in the contract of sale because it is one of the conditions of fulfillment of the contract. Further, the power of rescission because of a defect is considered in the Majallah as preventing sale from being obligatory, because of the defect in the thing sold; i.e. those characteristics that reduce its value give the purchaser the right to rescind the contract, thus rendering the sale not obligatory. Again, a sale by a person of sound mind is valid; where as a sale by an insane person is void. The declarative rule pertaining to the first sale is validity while that to the second is invalidity. In cases of necessity, license is granted to allow those things they are forbidden. Lastly come the rules that were made permissible abs initio which shall be clarified when we treat legal contracts.

---

[139] Guzelhisari, Manafi, 319.

[140] Amidi, Ihkam, I, 50-64.

[141] Qura'n 2: 275.

The definition of the science of jurisprudence (fiqh)

Al-Fiqh literally means "intelligence" or "discernment". Hence the verse, "A seal is set upon their hearts so that they do not discern"[142]. But in legal terminology fiqh means to science of jurisprudence; a man learned in it is a faqih (jurist).[143]

Article I of the Majallha defines fiqh as "the knowledge of practical legal questions". Jurists, however, define it in a more complete form their particular sources".[144] Let us take up this definition in detail: First, fiqh is a "science". It is true that jurists sometimes used the word "science" to mean comprehension or knowledge. They, no doubt, studied fiqh as a specific subject with specific principles, so that we can conclude that they considered it a "science" in the modern sense. This is in accordance with the prevalent modern opinion,[145] despite the reluctance of some legal writers to accept it.[146] The reason for this reluctance stems from the subject-matter, which is colored with social opinions and is affected by the circumstances of environment and human life. This is why some ancients considered it an art, such as defined by Celsius: "The art of justice and equity".[147]

---

[142] Qur'an 9:87.

[143] Ibn Nujaym, Bahr, I, 3.

[144] Haskafi, Durr, 1, 6.

[145] See, for example, Planiol, Traite, I, No.3; Austin, Jurisprudence, 75; and Keeton, Principles, I ff.

[146] See, for example, Lord Wridgt's speech at London University on 24 October 1937 in law Quarterly Review (1938), 187.

Secondly, fiqh is a science of "derived (substantive) legal rules". We have already considered the definition of the legal rule and its meaning. The word "derived" (substantive) signifies that the legal rules pertain to practical questions arising from the decisions made against persons subject to law in their daily transactions. That is why the rules pertaining to these questions were designated "derived" to differentiate them from that which is fundamental; i.e., the sources which form the subject of the science of sources, as has already been explained.

Thirdly, the doctors of jurisprudence added to the Majallha's definitions the phrase that the science of jurisprudence "is acquired from the particular sources of rules". For a doctor of jurisprudence must relate rules to their sources by deduction. One of the general principles mentioned in al-Majallah states: "There must be reason for a rule".[148]

Islamic Jurisprudence: a Religious and a Legal System

To Muslims, the *sharia'h* or *shar'* is that which God has promulgated through His Prophet, as witnessed in the following noble verses: "He has ordained (*shara'*) for you, that religion which He commanded unot Noah, and that which We inspire in you (Muhammad), and that which We commended unto Abraham and Moses and Jesus". "For each We have appointed a divine law (shirah) and a traced-out way". "And now have We set you (O Muhammad) on a clear road of (Our) commandment (*shariatin min al-amr*); so follow it, and follow not the whims of those who know not".[149]

The first Legislator, therefore, is God alone, Who revealed the Islamic shariah, including the religion and the legal system. It was natural that the science of jurisprudence, or the science of shariah should deal with religious observances along with all the transactions (among men), and that the doctors of the science of sources should consider this as a part of religious science.[150] It was natural also that the problems of transactions should be connected with religion as regards sources, the rules of exegesis and interpretation, and other avenues of thought, inquiry and deduction.

---

[147] In Justinian's Digest: "Est autem a justitia appellatum; nam, ut eleganter Celsus definit, jus est ars boni et aequi."

[148] Amidi, Ihkam, I, 4; and Guzelhisari, Manafic, 311.

[149] Qur'an 42: 13; 5: 48; 45: 18.

[150] Ghazzali, Mustasfa, I, 4.

We have already mentioned the fact that the rules of transactions grew up side by side with other customs during the time of the ancient nations. But the separation of law from religion took place gradually in the West, until it was complete at the zenith of Roman civilization. Law today deals exclusively with purely civil matters; and the science of law has become concerned with positive mundane rights.[151]

In short, Islamic law is a divine system of laws in its sources and primary rules. Civil law deals with transactions only; its rules derive from the authority of the state, which promulgates, amends, or abolishes them in accordance with its interests.

The division of the science of jurisprudence

Since Islamic jurisprudence is both a religious and a legal system at the same time, the reason for its division into two large parts becomes evident. One of these part deals with religious observances and is concerned with the affairs of the hereafter, such as belief, prayer, almsgiving, fasting and pilgrimage, all of which are outside the scope of this book. The second part is concerned with the affairs of this world and is sub-divided into three sections: criminal law; family law; and transactions.

The section on criminal law deals with felonies and crimes such as murder, theft, fornication, drinking (wine), and libel and with their punishment; including such incidentals as retaliation, penalties and blood-money.

The section on family law includes marriage, divorce (repudiation) and whatever is related to them, such as *iddah* (legal period of retirement assigned to a widow or divorced woman before she may marry again), relationship, alimony, child custody, tutorship, guardianship, inheritance and others. This part is known today as the deanship, inheritance and others. This part is known today as the law of personal status.

Lastly, the part dealing with transactions embraces property and those rights or contracts that are related to it; such as the rules of sale, hire, gift, loan, deposit, surety ship, transfer of debt, partnership, settlement, conversion, damage (to property), and similar matters.[152]

---

[151] Therefore it is surprising to read the definition at the beginning of Justinian's *Institutes*, I, I: "Jurisprudentia est divinarum atque humanarum rerum notitia."

Following this method of division, Article I of the Majallah reads in part:

> "Questions of jurisprudence are either related to the Akhirah, i.e., religious observances, or are related to this world, in which case they are divided into: marriage, transactions and penal matters. The Creator wanted the order of this universe to continue to a time He had predetermined; this continuation is only possible with the survival of the human genus, which in turn requires participation in a social structure that depends upon
> co-operation and partnership among individuals...

Then, in order to keep justice and order among (people), positive and free of dislocation, legal laws are needed in the matter of conjugal relationships, forming that part of jurisprudence dealing with marriage, and in matters of co-operation and partnership, constituting civilization and forming that part of the legal science dealing with transactions. Thus, in order for civilization to continue, it became necessary to lay down rules of punishment forming that part of jurisprudence dealing with penal matters".

If one looks at books on Islamic jurisprudence he will find that they are generally similar in style and arrangement; i.e., all of them begin by treating religious observances, and then take up the questions of criminal law, family law, and transactions. Various authors arrange their subject matter in one manner or another, but there is no clear cut difference between them.

Moreover, we find in these books various sections dealing with procedure, such as instituting an action, evidence, admission, trial, and also parts concerning military campaigns and rules of holy war, rules for those outside or inside the countries ruled by Islam, as well as information on quarter, was gains and poll tax, tithing, land tax, slavery and liberation of slaves.

---

[152] Islamic jurisprudence has been divided into three sections: religious observances, criminal law, and transactions. Transactions are further subdivided into: family law, monetary transactions, securities and disputes. See the margin of al-Fatawa al-Anqarawiyah, (Cairo, 1281 A.H.), I, I.

Division of modern laws

Positive laws are divided into two parts: public international law and internal laws.

The first is subdivided into two parts: public international law, which treats the relationships between states in peace and war, and private international law, which treats the questions of nationality and the conflict of laws in their application to foreigners.

Internal laws are again either public or private. Public law is that which pertains to the state and its relation to the individual. It includes the fundamental or constitutional law; administrative law which defines the functions of government in detail together with its specific duties and its relation to individuals; and criminal law which specifies the punishment for persons who violate public order and security. Criminal law is considered a part of public law because of the relationship of the state and the general public "right" to punishments. All French and most English jurists agree with this view.[153]

Private internal law deals with relations among individuals. It is divided into various categories, chief among which are: civil law which includes matters of personal status, property, rights *in rem*, and rights in *person- am*; commercial matters; and laws of procedure, which define the organization of the judiciary, its rules of jurisdiction, rules followed in instituting a claim, pleadings, judgments, and the method of enforcing such judgments. Other laws exist in addition to these private laws; e.g., labor laws and agriculture laws.

This is the approximate division followed in modern law; it is, on the whole, a practical and beneficial division which resembles in some respects the divisions of Islamic jurisprudence.

The Nature of Islamic Law (Shari'ah)

Legal Philosophy, as we have seen, takes a teleological view of law, a view that the existence of law is for the purpose and design which it has to fulfil. It cannot be denied that every system of law is oriented towards certain purposes which it seeks to implement. Islamic law or shari'ah is a divinely ordained system to guide mankind correctly to the path of peace in the world and bliss in the Hereafter. The affairs of this world are viewed by the Lawgiver in the light of the interests of the other World, a better one and everlasting. This underlines the difference between the Divine Law and the human laws which are concerned with the interests of this world alone. God is Most Gracious and Most Merciful. These attributes are fully reflected in His Law which is a gift and a mercy to His creatures. Mercy is, thus, the keynote of Shariah with the result that the sovereignty resting on force is reprehensible in the eyes of God. Rule by force is not the aim of Shariah, justice being the supreme end. Justice, according to Shariah, is of a higher order as it is not only to give to each his due but also to be merciful and return good for all. To do justice has been considered an act of devotion next only to belief in God.

---

[153] Certain English jurists disagreed with this view and considered criminal law part of private law. See Austin, *Jurisprudence*, 367, and Salmond, *Jurisprudence*, 544.

Shari'ah is, chiefly, expressive of the attributes of God and seeks to establish peace on earth by controlling society and imparting justice to it in fairness to all. Thus, order and justice are both the principal purposes of Shariah.

Order alone, without justice, renders the law a tyrannical instrument. The positive law of the modern world is concerned with order only, while the history of natural law, as expressed by Friedman, is a tale of the search of mankind for absolute justice and of its failure as is evident from the conflicting definitions and diverse views in this regard which have rendered justice almost unattainable.

Diverse Views

We have dealt with the various ideals and concepts of justice right from Plato to the present thinkers. Kelsey, as already stated, has attempted to reduce the many doctrines of justice to two basic types: rationalistic and metaphysical, the former being represented by Aristotle and the latter by Plato. He concludes that justice is an irrational ideal which cannot be defined. The realization of metaphysical justice, according to him, 'is shifted to another world.'

The different schools of Neo-Kantian Philosophers have realized the relativity of justice and have divorced the idea of justice from positive law. Some of them have refused to study the varying content of the idea of justice as irrelevant to legal science while sociological legal philosophers have formulated ideal of justice not in absolute terms, but as relative to civil isation. Nietzsche conceives of justice as the right of the strong man-might is right. Hobbes puts forward yet another conception of justice; but when a covenant is made, and then to break it is unjust'. As such, the definition of justice is no other than the performance of covenant, while according to Hume, justice is an 'artificial virtue'. Further, justice of the Stoics treats all men as equals, as Plato's justice does not.

To Dewey, justice cannot be described in definite terms. He says that justice is generally considered to be an unchangeable virtue, yet cut-throat competition is fair and just in individualistic competitive capitalism; right of Primogeniture is considered just, though it confers upon the eldest son the whole of the real estate of the father to the exclusion of other sons. He enumerates other cases where injustice is taken for justice such as the system of taxation, free trade and protection etc. According to Friedman the concept of justice, as specified above, is of necessity devoid of ideological content. The 'justice' of a given legal system may be *laissez faire* economy, or the public ownership of all productive enterprise; it may be a parliamentary multiparty system or a non-party state; the system may be built upon the ideology of separation of powers, or on the subordination of administration and the judiciary to the will of the legislator. It may aspire to the equality of all citizens, or to a hierarchical structure of superior and inferior citizens; it may implement the supremacy of international over national law or - as is the case with almost all contemporary legal system - the inverse'.

What emerges from all this varying attempt, says Friedman 'is the failure to establish absolute standards of justice except on a religious basis. But religion is ultimately a matter of revelation and faith. The Principles established by God must by believed in as part of one's religious faith. On the other hand, the philosophies which make knowledge of justice a matter of intuition are merely escapist. Their ultimate trust is not in everlasting principle of justice, but in the wisdom, goodness or the sheer power of men'.

Absolute justice, therefore, consists in Shari'ah alone which is based on revelation and, as such, --- the everlasting principles of justice. One who live according to Divine Law does justice not only to himself but to the world around him. 'It is God Who has sent down the Book in right form with everything therein justly balanced', is the Qur'anic verse (42:17) Revelation is, indeed, a balance by which to weight all moral issues, all questions of right and wrong conduct. While reason of varying character gave diverse and even contradictory definitions and form to justice and, thus, failed to achieve it, revelation with its absolute standards of justice has not only achieved it but is a never ending source of it.

Shari'ah combines in itself the 'is' and the 'ought' of law. While the 'is' stands for the stability law, the 'ought to' represents the supreme end of law which is no other than justice. Thus Shari'ah is at once the 'is' and the 'ought' of law, that is, Positive and Ideal both.

According to Austin, 'the science of jurisprudence is concerned with positive laws, or with laws strictly so called without regard to their goodness or badness. Thus, the positive law of Austin is divorced from justice, while justice is the part and parcel of Shari'ah.

Justice as a Sacred Trust

Justice, in Islam, has its own meaning. It is likened to a sacred trust, a duty imposed upon man to be discharged most sincerely and honestly. This is to identify one's own interest with those of others and administer the trust in all sincerity as if an act of devotion. There should be no subjective element in the definition of justice. What Islam suggests is the reflexive attitude of mind and objective approach to the problem. Justice, therefore, is the quality of being morally just and merciful in giving to every man his due. This idea is expressed by the Qur'anic verses: 'God does command you to render back your Trusts to those to whom they are due; and when you judge between man and man, to judge with fairness'; 'We have sent down to you the Book in truth, that you mightiest judge between men as guided by Allah: so be not (used) as an advocate by those who betray their trust'.[154]

According to Razi and other Commentators of the Qur'an, the word 'Trust', in the plural, comprises all sorts of trust which one has to fulfill, chief among them being 'justice', and that men in authority should not judge according to their whims but in strict conformity with the dictates of God. The above verses, as explained by the Commentators, point to the fact that absolute justice is known only to God, for He alone knows what is good for mankind, hence it is always safe to act as directed by God. To know the objective of good is beyond our power: 'Perhaps you dislike a thing which may be good for you, and perhaps you like a thing which may be evil for you'.[155]

There is another Qur'anic verse which gives us an idea of justice as distinct from injustice: 'God commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds and injustice and rebellion'. Justice is a comprehensile term and may include all the virtues, but religion asks for something warmer and more humane, the doing of good deeds even where they are not strictly demanded by justice, such as returning good for ill and of course a *fortiori* the fulfilling the claims of those whose claims are recognized in social life, Similarly the opposites are to be avoided: all shameful things, every unjust acts, each wicked deed.

---

[154] Al-Qur'an, 4:105

[155] Al-Qur'an, 2:216

'Things are known by their opposites'. Justice is better known by that which is injustice. The Arabic word for injustice is '*Zulm*', used in various senses. For instance, in the Qur'anic verse (2:59), it is used in the sense of transgression; in (4:64), as unjust; in (42:41), as wrong; in (10:54), as sin, while the word '*qist*' implies justice. So justice is Virtue in which there is neither transgression, not tyranny, nor wrong, nor sin. In sum, to do justice is to undo injustice.

Here we refer to the rule of 'Sadd al-Dharai' or preventive measures adopted by Divine Law to eradicate the evils before they take root. This rule plays a significant part in providing virtue by crushing vice. It strikes at the very root of the evil and obviates the causes which give rise to it. Promiscuity, for instance, is prohibited lest it should lead to adultery. Ibn Qayyim al-Jawziya, in his *I'lam al-Muwaqqiin* has given several instances of this kind that prove the efficiency of Divine law and the unique manner in which it uproots evils. Justice is, thus, established by eliminating that which causes injustice.

Islamic Justice

Islamic justice, as such, is much higher than all other systems of justice, be they Greek, Roman or any other human law, for it searches the innermost motives. 'Acts are determined by motives' is a saying of the Prophet and we are to act as if in the presence of God Who is closer to us than our jugular vein and knows even what our soul whispered to us. To render justice, says Sarakhsi, constitutes one of the noblest acts of devotion'. According to kasani, it is one of the best acts of devotion, and one of the most important duties, after belief in Allah.

Justice in fact is the bond which holds society together and transforms it into one brotherhood, every one of which, as said the Prophet, a keeper unto every other and accountable for the welfare of all. Divine law is a strong and unbreakable rope of rescue and we are enjoined to hold it fast: 'And hold fast, all of you together, to the rope of God, and do not separate is the Quranic Verse. While law is the cable of God, justice is affection and mercy to the creatures of God (Community) which demands of us fulfilling all the claims that are recognized in social life.

Justice is thus the duty imposed by God and we have to stand firm for justice though it may do detrimental to our interests or to the interest of those who are near and dear to us. This is repeatedly asserted in the Qur'an: O those who believe! Stand out firmly for God as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is nearer to piety and fear of God.[156]

This verse refers to the real test of justice when one whom we have to do justice belongs to the people who hate us or to whom we have an aversion. Even in such circumstances we have to stand firm and discharge our duty in all sincerity.

God has commanded the believer, once again, to observe justice in dealing and even to speak justly when we speak. And come not near to the orphan's property except to improve it, until he attains the age of full strength, speak justly, even if a near relation is concerned and fulfill the covenant of God: thus does God command you that you may remember. Such is the moral law which culminates in purity of motives in the inmost recesses of heart and is for our own good to follow. Let us dwell for a while on the absolute standards of justice.

Absolute Standards of justice

What is justice is the question which philosophers have been debating since the fifth century B.C. It is said that justice is the chief concern of man but, what justice is remains a matter of dispute not only in Philosophy but also in Ethics and in Jurisprudence.

Greek philosophers start with justice as an individual virtue, as an end or purpose of law which gives to everyone his due. In its further development we get the idea of the maintenance of that which is just and fair, a regime of establishing rights in accordance with law.

We have already noticed that according to Plato justice is the supreme virtue which is inexplicable by rational argument, but consists in each individual's performance of duties assigned to him and his keeping himself within the appointed sphere. Plato calls upon everyone to exert himself to do his duty in the class in which he finds himself placed. Thus he wants to maintain the social *status quo* and prevent friction among the members of society.

Aristotle's doctrine of justice is different from that of Plato. This is a pure ideal of what law ought to be so as to render to each his own. His main contribution is the distinction between 'distributive' and 'corrective' or 'remedial justice'. The first directs the distribution of goods and honors to each according to his place in the community and orders equal treatment of those equal before the law, the second relates to administrative law, punishment to redress wrongs and crimes and the laws to have equal application in the courts.

---

[156] Al-Qur'an, 5:

From the above it is evident that Plato, in his doctrine of justice, lays stress on morality, while Aristotle emphasizes the importance of law. In the later theories, most of thinkers have gone back either to Plato or to Aristotle, hence there is a the conflict of views and no compromise could be arrived at. Plato's concept of morality serves only to crush the liberty of the individual, for he has to keep himself within the class in which he finds himself placed, while Aristotle seems to stress the justice of legality or positivity in preference to any principles of good. Thus morality and law are not only at variance with each other but also misconceived, with the result that there are no absolute standards of justice in the Modern Western legal thought which owes its inspiration to Greek Philosophy.

It is to the credit of Islam that it has absolute standards of justice as they are based upon the norms of vice and virtue which are supported by revelation and the fundamental principles of law. This is the distinctive feature of Islamic justice.

Justice in Islam is, thus, a happy systhesis of law and morality. It seeks not to crush the liberty of the individual but to control it in favour of society which includes the individual as well, and thus protects his legitimate interests too. Law plays its part in reconciling the interests of the individual with those of society and not *vice versa*. The individual is allowed to develop his personality with the only proviso that he should not come into conflict with the interests of society. This puts an end to friction and satisfies the claims of justice. To do justice is, therefore, to live according to the principles of Islam.

Order and Peace

The positive legal system of the modern world, as already stated above, concerns itself to fulfilling the 'order' requirements only, hence proved, sometimes unworkable and for this reason abandoned and overthrown. History teaches the lesson that men will not put up with systems of law orderly to the extent of becoming tyrannical.

Divine law is not the law of a tyrant but of God Who is Most Merciful. This attribute of God is reflected in His Law to the utmost degree. It has twofold object, spiritual benefit and social welfare; its policy is therefore to encourage obedience by offering rewards. God being Oft-returning, His Law allows time for penitence and amendments in one's life. It has its own ethical norms of good and bad, virtue and vice and the assessment of all human actions and transactions according to these norms in its outstanding feature which ensures the uniformity of society.

Shariah has the character of a religious obligation to be fulfilled by the believer. This Law of God remains the law of God even though there is no one to enforce it. The believers, even if they reside outside the territory of Islam, are bound by the law. For the law was revealed to bind the believers as individuals wherever they may be. The law takes into consideration primarily the rights of the community; the personal rights of the individual are protected in so far as they are not in conflict with the rights of the community.

In order to secure order in society shariah charges man with dual responsibility; one in relation to God and other in relation to society which results in a law of duties rather than of rights, or moral obligations binding on the individual, from which no earthly authority can relieve him and which he disobeys at the peril of his future life.

And, indeed it is the fear of punishment in the Hereafter which has been successful in providing a deterrent against evil, more effective that punitive legislation of the severest type, provided, of course, that faith is real and not a mere formality. 'Verily, the Qur'an is guidance unto those who fear Allah', and history is replete with biographies of men who led the cleanest, purest, and noblest lives mainly due to their fear of Allah and of reckoning on the day of judgment. O those who believe! fear God as He should be feared, 'And fear God that you may prosper', is the voice which reverberates and echoes in the Qur'an.

Fear of God (Taqwa)

The prosperity of society depend not so much upon the rigour of law as upon righteousness inspired by the fear of God, i.e., *taqwa*. And, therefore, shari'ah is a code of moral conduct, *taqwa* being the standard for the judgment of human actions: 'O mankind! surely We have created you of male and female, and made you nations and tribes that you may identify each other; surely the noblest of you in the sight of God is he that fears God most'.[157]

The very idea that 'God knows what the soul of man whispered to him and that 'He is closer to him than his jugular vein', and 'three persons speak not privately together, but He is their fourth', 'not five but He is their sixth, nor fever nor more, but where ever they be He is with them, and that whether he makes known what is in his mind or hide it, He will bring him to account for it', is enough to strike terror in the heart of a God-fearing man and make him abstain from evil thinking, let alone evil doing.

---

[157] Al-Qur'an.

The law, therefore, remains content with prescribing punishment for the crime of grave nature such as murder, physical injury, adultery, fornication, theft, high-way robbery, calumny, and wine drinking. For the most part, law is not coercive but corrective and persuasive.

The chief importance of the Shari'ah lies in this that it builds the mind and particularly the character of man in such a manner that he takes pleasure in doing well to others. This is most effective in establishing order and peace. Character and conduct are of nearly the same meaning. Character, according to Schopenhauer, lies in the will, and not in the intellect. Character, he says, is the continuity of purpose and attitude: and these are will and a good will is profounder and more reliable than a clear mind.

Brilliant qualities of mind, according to him, win admiration, but never affection and all religions promise a reward for excellences of the will or heart, but none for excellences of the head. To Schopenhauer, the world is the will to live, while in Islam, the world is the will to live for others, which requires the purification of soul.

Purification of Soul (Tazkiat al-Nafs)

Shari'ah believes in the purification of soul or *Tazkiat al-Nafs* and aims at the very heart of man which is the seat of emotions and controls the desires that are directed to the possession of some object from which pleasure is expected. Desire is often so personal that its satisfaction leads men to deviate from the right path. To control such desires has more fundamental than their satisfaction and the proverbial saying is that it is better, by far, to be a human being dissatisfied than a pig satisfied. Man, therefore, is enjoined to act with an eye on the Hereafter and the pillars of Islam-Belief in the One God, Prayers (Salat), Fasting (Saum), Poor-due (zakat), and Hajj (Pilgrimage) are contrived in such a manner that they purify the soul and divert the attention of man from selfishness to selflessness, from self-seeking to self-sacrificing.

Self-Sacrifice

Self-sacrifice is, and has been, the main factor in establishing peace and prosperity in society, to which there is a reference in the Qur'anic verse: 'But those who before them, had homes (in Madina) and had adopted the Faith, show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those saved from the covetousness of their own souls, they are the ones that achieve prosperity'.[158]

The verse gives account of the Ansar (the Helpers), the people of Madina who embraced Islam and accepted the Oneness of the Godhead. They were so affectionate to the Makkan people of the same faith (and had come to them for refuge) that they not only gave them refuge but also showed a remarkable spirit of self-sacrifice so much so that the ties of full brothers were established between the Helpers and the Refugees (who had actually abandoned their homes and migrated to Madina for the sake of Islam). The Helpers counted it a privilege to entertain the Refugees and gave them preference over themselves though poverty was their own lot. These are, indeed, the righteous deeds which bolster up the social relations.

Righteousness

Such is the scheme of life envisaged by the Divine Law, which wrought a great change in society by founding it on righteousness. 'Help you one another in righteousness and piety, and help you not one another in sin and transgression', is its call to mankind. Those who are unaware of the connotation of righteousness are apt to misunderstand the Shari'ah. We, therefore, refer them to the Qura'nic verse, 'It is not righteousness that you turn you faces toward East or West; but it is righteousness to believe in God and the Last Day, and the Angels and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; --- fulfill the contracts which ye heave made; and to be firm and patient, in pain (or suffering) and adversity and throughout all periods of panic, Such are the people of truth, the righteous'.[159]

The above verse is reinforced by another: "By no means shall ye attain righteousness unless ye give (freely) of that which ye love; and whatever you give, of a truth God knows it well".[160]

---

[158] Al-Qur'an, 59:9

[159] Al-Qur'an, 2:177

[160] Al-Qur'an, 3:92

The first one gives a beautiful description of the righteous and God-fearing people which Shari'ah aims to create, for society composed of such men is not only well- disciplined but also free from evils. Man has to obey salutary regulation and should fix gaze on the love of God and the love of his fellowmen. Our faith must be true and sincere and we must be prepared to express it in our deeds of help and charity to our fellowmen, for 'God does not accept faith if it is not expressed in action, and does not accept action if does not conform to faith, as said the Prophet The charity, according to the second verse, is to give something that we value greatly, something that we love most. This refers to self-sacrifice and regards for others. It is altruism that should be the principle of our actions which automatically results in a good a well-regulated society.

Law of Equality (Qisas)

There is again the Qur'anic Verse (2:178) which refers to the law of equality: 'O those who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made (by the heir of the slain,) for him, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a Mercy from your Lord. After this, whoever exceeds the limits shall be in a grave penalty'.[161] This verse is followed by another: 'In the law of Equality there is (saving of) life to you, O the men of understanding'.[162]

These two verses have greatly served to foster the feelings of mercy and to mitigate the horrors of the pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed with a strong recommendation for mercy and forgiveness. Shari'ah is a Law of Equality and of Mercy both. There should be some measure of equality in taking a life for a life; the killing of a slave of a tribe should not involve a blood feud where many free men would be killed for (as it often happen in the pre-Inslamic days). Hence the law of Mercy, if it could be obtained by consent, with reasonable compensation, would be better. One life having been lost, many lives should not be wasted. Let the law, at most, take one life under strictly prescribed conditions, and shut the door to private vengeance or tribal retaliation. But if the aggrieved party consents, forgiveness and brotherly love is better.

---

[161] Al-Qur'an, 2:178

[162] A-Qur'an, 2: 179

The condition of consent is laid down to prevent further evils and to keep the door of Mercy open. This is the merciful nature of Shari'ah, while, in Western laws, no felony can by compounded.

It may be noted that Islam, while recognizing retaliation as the basic principle which is fully consistent with the peace and progress of society, and lays down rules for the purpose of confining retaliation within the narrowest possible limit, the theory set up is that retaliation is not solely a private right, but that the right of the public is also mixed up in it. Hence the State takes charge of its supervision and imposes strict conditions with a view to suppress the spirit of vengeance which has been so harmful to society.

Retaliation is allowed only in cases of willful destruction of life or limb or of such bodily injury as is capable of definite ascertainment. The law, though it recognizes retaliation in theory, discourages this form of remedy in every possible way. For example, if there be the lest doubt as to the willful character of the offence or the proof, retaliation will not be ordered. Retaliation being the right of the person injured or of his heirs, they can compound with the offender for money, or, if they chose, forgive him, 'and to forgive is divine'.

This law of *qisas* or equality is applicable to murder only when it is intentionally committed and not to manslaughter due to a mistake or an accident. The severe punishment meted out for murder, while it prevents blood feuds, is also a lesson for others not to commit such a crime which, in turn, is saving of many lives. Shari'ah, as such, far excels other laws in its treatment of crime mercifully and also efficiently.

Shari'ah-A Beacon Light

Shari'ah is, thus, a beacon light to show the way to permanent peace and order, and the Qur'an, which contains the law, is rightly called a light and a book of illumination: Now a light has assuredly come to you from God and a book of illumination, by which He will guide those who shall seek His pleasure to paths of peace, and will even, as He likes bring them out of darkness into light and direct them to the straight path (of success in life).[163]

Here it may be pointed out that the Commentators hold different views as regards the Arabic word 'Noor' or light. Some take it for the Qur'an; others for the Prophet and still others for Islam. This point has been discussed by Abduhu in his commentary of the Qur'an called manar. He holds that this word is applicable to the Qur'an.

---

[163] Al-Qur'anm 5:

A survey of the conditions prevalent before the advent of Islam discloses the fact that mankind were steeped in darkness and in sin, while justice and peace had lost their significance. The whole world was in a state of chaos and corruption: Tyranny was rampant and selfishness prevailed; the glory of Hellas had declined and the Roman's great system of law decayed; Persia played in the hands of the votaries of luxury; India was torn with castes, China a prey to anarchism, and Arabia a centre of iddatry.

The need was felt for a legal system of universal character under God's Sovereignty, so that scattered and strayed humanity be guided to the right path and be formed into one brotherhood. Many were the attempts, in the past, of philosophers and thinking men to attain the unity of mankind and everlasting peace. Many were the messengers of God to spread the eternal light of God's Grace and Mercy, and manifold their forms to fulfill their mission according to the needs of the times, but they were known in one place and not in another, among one people and not among other. But Muhammad (peace and blessings of Allah be upon him) came, in the fullest blaze of history, as the Last of the Prophets, with a Message, universal and for all time, from God the Most High and the Most Merciful and delivered it to mankind in plain words without the need of Priest and Priestcraft, the oneness of Godhead, His Law, His Mercy and the Brotherhood of mankind.

Shari'ah-a Criterion

Divine Law, according to the above verse, has come to us as a sure and unerring guide to the straight path of peace and prosperity. It gives us in clear and unequivocal terms what is right and what is wrong, what is permissible and what is forbidden. The main function of law is to provide mankind with a model behavior and a criterion for distinction between good and evil. This is stated in the Qur'anic verse: 'Blessed is He Who sent down the Criterion to His servant that it may be an admonition to all mankind'. Law as such is universal and for all time. As a criterion and standard for judgment it has to remain in its ideal form.

Antinomies

There are certain antinomies in life that have to be reconciled with. It is always safe to steer clear of the extremes in life. Shari'ah, therefore, adopts the middle course and brings about reconciliation between the antimonies which otherwise obstruct the operations of the law and thwart the promotion of peace and prosperity. So persistently has pendulum swung backwards and forwards between certain antinomy values that we cannot but register a tension which calls for balance and harmony. Islam is the religion of peace and has a wonderful capacity to maintain equipoise in life which is fully reflected in its law, with the result that all such antinomies are reconciled and set at rest.

Stability and Change

According to Pound, law must be stable, yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need for change. This has given rise to many theories. So far as order is concerned, legal theories are inclined to stress stability rather than change. Saving's Historical school opposes legal change. For this school the task of a jurist and a legislator is to verify and formulate existing legal customs; the function of law is essentially to stabilize, not to be an agent of progress. Analytical positivism, by its emphasis on logic and obedience to written law, tends to regard stability and certainty as the paramount objects of legal interpretation. On the other hand, all utilitarian and sociological theories tend to emphasize the changing content of law because they see it against its social background and the needs of life. The ways to attain pleasure and avoid pain are subject to change with social circumstances, so the law must change with them.

We have discussed this problem in the preceding pages. Divine Law is distinct from human laws in that it has its own method and ethical norms of good and evil which keep social change itself within bounds. Further, it is endowed with an amazing capacity to reconcile stability with change.

As already explained, Divine law has broad principles which may be interpreted, with reference to the words, meaning implicit therein, context thereof and traditions of the Prophet, to accommodate and cover the change, and if anything essential is left uncovered, the Rule of Necessity and Need may be invoked to cover it. We shall illustrate this point later, in the following chapter, by example from the Qur'an, the underlying principles of which serve to reconcile stability with change. Besides, there are other antinomies as given below which are to be reconciled by the legal system so as to work successfully.

Reason and Revelation

Reason is the ordinary thinking faculty or power of the human mind which is supposed to be the source of real knowledge. But it differs from man to man. For instance, see the philosophers how they contradict each other. There is perhaps not a single point on which all of them agree. They differ even about observable phenomena. Some say that substance is composed of forms; others hold that it consists of indivisible particles, and still others, like Democritus, that it is compounded of infinitesimal particles. According to Schopenhauer, reason has no value of its own, but that nature has produced it for the service of the individual will. To Hume, reason is merely a slave of passions. Kant, in his Critique of Pure Reason, has proved the limitations of reason. Reason is liable to err and cannot be the source of knowledge, while Revelation alone is the source of genuine knowledge, as we have proved earlier. Revelation is the word of God, transmitted to the Prophet Muhammad (peace and blessings of Allah be upon him), through the Angel Jibra'il (Gabrial), whose integrity and veracity are beyond doubt. Shariah is based upon Revelation which is the only reliable source of the knowledge of things, their goodness and badness. It demands goodness and forbids evil. Real goodness cannot be rationally known determined. Reason is fallible and deficient, hence cannot be relied upon. Shariah, therefore, prefers to have analogical reasoning as a solution for the interpretation of law.

Here we refer to Shafii's theory which represents a compromise between the old unrestricted use of reason (or *istihsan*) and the rejection of all human reasoning. He reconciled the two schools of extreme views by allowing the use of reason through analogy which was admitted into classical theory and claims finality. To deviate from it is to destroy the character of Shariah.

Collectivism and Individualism

The fundamental controversy of political thought in the history of Western civilization has been the one between collectivist and individualist ideals. Whether the individual or the community is the ultimate value is a problem which was studied, from the standpoint of justice, by Greek Philosophers centuries before the Christ.

Legal theories assume one of three attitudes: Either they subordinate the individual to the community, or they subordinate the community to the individual; or they attempt to blend the two rival claims.

'Seldom has the supremacy of the community over the individual been more radically formulated than by Plato. In the Republic that supremacy is so marked that there is not only no room for private right but not even any for private institution such as family and property. In the Laws, the work of his old age, these institutions are recognized but are still under strict state supervision. It is mainly the cultural background of Greek civilization and education which distinguishes Plato's ideal state from that of modern totalitarian system of government'.[164]

Modern totalitarianism asserts the supremacy of the community by the complete destruction of individual rights. This is achieved through the abolition of separation of powers and judicial independence. The Catholic theory of society makes the community supreme over the individual in a different manner, for he has to accept the place and function into which he is born.[165] The most outstanding of all such theories is Marxism, which has completely crushed individual rights.

Hobbes stands for individualism, but his doctrine leads to political absolutism. Bentham's utilitarianism, Spencer's theory of evolution all embody, in different ways an individualistic philosophy, but none of these theories represents perfect balance between the interests of the individual and those of society.

A synthesis between the individual liberty and the interest of society cannot be attained unless the life of society is based upon righteousness. It cannot be denied that society is but a collection of individuals, the problem is, therefore, to build the character of the individual in such a manner that, far from being injurious to society, he contributes his own good to its welfare. Shariah achieves this object by means of its own ethical norms of vice and virtue and with its emphasis on acquiring knowledge of one's duties to God and to society. Shariah is called Fiqh or understanding of what is permissible and what is forbidden; what is good and what is evil. Knowledge is the only means whereby the qualities characteristic of good type are cultivated.

Of all the Divine attributes with which man has to endure himself to discharge satisfactorily his duties, knowledge commands precedence.

'Acquire knowledge', says the Prophet, 'it enables the possessor to distinguish right from wrong; it lights the way to heaven. It is our companion when friendless; it guides us to happiness; it sustains us in adversity; it is a weapon against enemies and an ornament among friends. By virtue of it God exalts communities and markst them and guides them in good pursuits, and gives them leadership so much so that their footsteps are followed; their deeds are imitated, and their opinions are accepted and held in respect'.[166]

---

[164] Friedmann, Legal theory, P. 89

[165] Ibid, te op.cit. P.89

It is against such background that the individual is offered full opportunities in Islam to develop his personality so that he may be better qualified to serve the interests of society. In consequence, there can be no clash between the interests of the individual and those of society. Thus, the individual is for society, while the is society for the individual.

Positivism and Idealism

In legal theories positivism and idealism are portrayed as opposed to each other. While idealistic theories are based upon the principles of justice and are mainly concerned with what law ought to be, the positivistic theories are inspired by conflicting views of law. Analytic positivism concentric ates on the analysis of legal concepts and relations on the basis of a strict division of 'is' and 'ought' and is therefore divorced from justices as against this pragmatic positivism regards social facts as determining legal concepts. To the former, law means the command of the sovereign and therefore stable, while the latter considers law as subservient to society, hence always in flux changing with every change of society. Positivism is, thus, victim to tensions and conflicts.

Further, the Analytic Positivism being divorced from justice and separated from ethics, natural law came into existence as an ideal and a higher law to serve as a standard of justice, but based on reason which is ever changing it could not stand on its own, and ultimately broke down, as we have already seen.

Due to separation between 'is' and 'ought to be' there could not be any reconciliation between Positive Law and Natural Law. Shariah, therefore, has combined in itself the 'is' and the 'ought' of law and stands at once for both order and justice. Being the command of God, the Supreme Sovereign, it is positive law and, having particular regard for justice, it is ideal, hence can be rightly described as positive law in Ideal form.

In Shari'ah, positivism and Idealism, in their real sense, are not only reconciled but are in perfect harmony with each other. This marks Shariah as superior to all other laws of the modern world. Shari'ah would work well only when its ideal form is retained, for it regulates human life and society in its own way and with its own ethical norms which are not susceptible to change. Shariah is compared to a balance. Allah is Who has revealed the Scripture with truth and Balance. 'By the soul and the balance given to it and the sense of discrimination and power of choosing between the wrong and the right, happy is he who kept it pure, and unhappy is he who corrupted it.'[167] Balance is, therefore, to be applied in the manner and as prescribed by God and not otherwise.

---

[166] Ibn Abdul Barr, Fazlul Ilm.

Meticulous observance of shariah is thus enjoined, for it is the only standard of judgment 'if you differ in anything among yourselves, refer it to God and His Apostle, if ye do believe in God and the Last Day.[168] That is best and most suitable for final determination'. Finality rests with shariah which implies that shariah must be preserved in its ideal form 'And those who do not judge by what God has revealed are not only transgressors but also unbelievers and wrong doers'.[169]

---

[167] Al-Quran, 91:7-10.

[168] Al-Quran, Al-Nisa : 59.

[169] Al-Quran, Al-Maida : 47, 48, 50.

CHAPTER 8

Islamic Law: an Assessment of its age-wise development over successive periods of the history with a brief survey of the respective features

Introduction

Despite the fact that the original immediate sources of the law of Islam are confined to the Book of Allah and the sunnah of His Prophet Muhammad, all ages of the Islamic history have invariably been witnessing that the ulama, the men of Islamic learning, have always applied themselves to the act of deliberation on these sources, deduction and inference from them, fathoming their depth and applying the general principles of the shariah to the cases and events developing in all ages. As a result, the Islamic law never suffered a reverse; it always kept abreast of the constantly changing world. Blaming the Islamic law with anachronism, unable and incompetent to meet the challenges of the developing trends hitherto unknown revolutions and unprecedented changes would therefore be the silliest idea. Those thinking along this line are undoubtedly unaware even ignorant of the potentials and the history of development of the law of Islam.

Historically speaking, the Islamic legal system has reined the world for centuries, and in each age it has been the subject of the deliberation of the law experts and the men of exceptional intelligence. The long story of the gradual development of Islamic law over ages may briefly be put into the following seven ages:

First Age : The Age of the Holy Prophet.

Second Age : The Age of the Rightly Guided caliphate till the end of the first part of the first century of Hijrah.

Third Age : The age of the Establishment of Fiqh and Jurisprudence. This age takes its start from the mid of the first Hijri century and ends with the earlier years of second century of Hijri. In this age the fiqh assumed the status of a separate branch of Islamic Learning and a number of the schools of jurisprudence came into being.

Fourth Age : This age commences from the beginning of the second hijrah century and ends with the mid of the fourth century of Hijrah. During this long age the Islamic legal system passed through the stages of compilation, research and an all - inclusive development side by side this, the act of inference and deduction in the light of the general and broad normative principles of the shariat, touched new heights of development. During the same age the principles of Islamic jurisprudence got completed and perfected.

Fifth Age : This age begins from the mid of the fourth century of Hizrah and lasted till the fall of Baghdad which occurred in the mid of the seventh Hijrah century. This age is marked by a large production of the valuable literature on jurisprudence and the associated branches and disciplines and the noted jurisprudents applied themselves actively to the act of *takhrij and tarjih.*

Sixth Age : This age is stretched over the period from the mid of the seventh century till the compilation and promulgation of the al-Mujallah during the Uthmanid Caliphate. The compilation of al Mujallah took place in the eighties of the thirteenth century of Hijrah and the Caliph announced its promulgation as the law of the whole caliphate territories. This age, generally speaking, is marked by a visible decadence both in academic and political spheres.

Seventh age : The post Mujalla period till the present day is regarded the seventh age in the history of the Islamic jurisprudence.

In the following pages we are going to give a brief historical description of all the seven ages with special concentration on the peculiarities and specific features of each of those ages.

The First Age: The Age of the Prophet (peace be upon him)

During the same age the law of Islam took its genesis, establishing its foundations and completing its legal elements. During this age the final source and authority was the being of the Holy Prophet and during this age all the propositions and things emanating from the Book of Allah and the directions of the Holy Prophet fell under Fiqh and the term was equally applied to the irrespective of that to which department of the shariat they belonged.[170]

During the Prophet's Makkan era the subject of concentration remained mostly the issues related to Tawhid (Monotheism), refutation of Shirk

---

[170] [Ibnal-Qayyim, Illamul Muwaqiien. Vol.p.11]

(polytheism), the reform of beliefs and the articles of faith. The issues related to practical sphere of life were rarely touched. In this sphere light was shed only on various problems of Namaz, and very little on other issues related to behavior. A systematic explanation of the juristic problems and the legislative movement could begum only after Hijrah. This age was of the actual *fiqh* rather than of the inferential and deductive one. Faced with any problem associated to ideological or practical sphere of human life, recourse was made to the Holy Prophet and his answer, or the Qura'nic verse revealed to deal with the problem formed part of the law of Islam. The actual problems of life at that blessed time were not so much complex and therefore hardly there was a need to make recourse to the act of inference deductive system even for the noted men of learning, let alone the laymen. The bulk of the Islamic fiqh which thus came into being, though was not systematically arranged and compiled subject-wise, still it comprised most of the basic principles of the law of Islam, its most interests and expediencies. It in fact included all those normative principles, commands and ideological foundations which are the basic need of a perfect and complete law, in the light of which might successfully be solved all the problems and the complex issues arising out from the developments and changes of life. To illustrate this claim, some general maxims, which enshrine the general foundations and normative fundamentals of law and which are amply sufficient to meet all the legal problems of all ages, are being produced here. These are:

أَلَّا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ﴿٣٨﴾

That no bearer of burdens will bear the burden of another.[171]

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِۚ

O those who believe! fulfill all obligations. [172]

وَأَن لَّيۡسَ لِلۡإِنسَٰنِ إِلَّا مَا سَعَىٰ ﴿٣٩﴾

And that man will have nothing except what one strives for.[173]

---

[171] Al-Quran 53:38.

[172] Al-Quran 5:1.

[173] Al-Quran 53:39.

وَلَا تَأْكُلُوٓا۟ أَمْوَٰلَكُم بَيْنَكُم بِٱلْبَٰطِلِ وَتُدْلُوا۟ بِهَآ إِلَى ٱلْحُكَّامِ
لِتَأْكُلُوا۟ فَرِيقًا مِّنْ أَمْوَٰلِ ٱلنَّاسِ بِٱلْإِثْمِ وَأَنتُمْ تَعْلَمُونَ ﴿١٨٨﴾

And do not eat up your property among yourselves under false reasons, nor use it as bait for the judges with intent that you may eat up wrongfully and knowingly a little of other people's property.[174]

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَأْكُلُوٓا۟ أَمْوَٰلَكُم بَيْنَكُم
بِٱلْبَٰطِلِ إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٍ مِّنكُمْ ۚ وَلَا تَقْتُلُوٓا۟
أَنفُسَكُمْ ۚ إِنَّ ٱللَّهَ كَانَ بِكُمْ رَحِيمًا ﴿٢٩﴾

O those who believe! eat not up your property among yourselves wrongfully, except that there be amongst you traffic of trade by mutual consent. [175]

۞ إِنَّ ٱللَّهَ يَأْمُرُكُمْ أَن تُؤَدُّوا۟ ٱلْأَمَٰنَٰتِ إِلَىٰٓ أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ
ٱلنَّاسِ أَن تَحْكُمُوا۟ بِٱلْعَدْلِ ۚ إِنَّ ٱللَّهَ نِعِمَّا يَعِظُكُم بِهِۦٓ ۗ إِنَّ ٱللَّهَ كَانَ سَمِيعًۢا
بَصِيرًا ﴿٥٨﴾

Allah commands you to render back your Trusts to those to whom they are due, and when you judge between people, that you judge with justice.[176]

وَأَنَّ هَٰذَا صِرَٰطِى مُسْتَقِيمًا فَٱتَّبِعُوهُ ۖ وَلَا تَتَّبِعُوا۟ ٱلسُّبُلَ فَتَفَرَّقَ
بِكُمْ عَن سَبِيلِهِۦ ۚ ذَٰلِكُمْ وَصَّىٰكُم بِهِۦ لَعَلَّكُمْ تَتَّقُونَ ﴿١٥٣﴾

---

[174] Al- Qur'an 2:188.

[175] Al-Qur'an 4:29.

[176] Al- Qur'an. 4:58.

And, [moreover], this is My path, which is straight, so follow it; and do not follow [other] ways, for you will be separated from His way. This has He instructed you that you may become righteous.[177]

وَلَا تَقۡرَبُواْ مَالَ ٱلۡيَتِيمِ إِلَّا بِٱلَّتِي هِيَ أَحۡسَنُ حَتَّىٰ يَبۡلُغَ أَشُدَّهُۥۚ وَأَوۡفُواْ
بِٱلۡعَهۡدِۖ إِنَّ ٱلۡعَهۡدَ كَانَ مَسۡـُٔولٗا ٣٤

And do not approach the property of an orphan, except in the way that is best, until he reaches maturity. And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned.[178]

ٱلطَّلَٰقُ مَرَّتَانِۖ فَإِمۡسَاكُۢ بِمَعۡرُوفٍ أَوۡ تَسۡرِيحُۢ بِإِحۡسَٰنٖۗ وَلَا يَحِلُّ
لَكُمۡ أَن تَأۡخُذُواْ مِمَّآ ءَاتَيۡتُمُوهُنَّ شَيۡـًٔا إِلَّآ أَن يَخَافَآ أَلَّا يُقِيمَا
حُدُودَ ٱللَّهِۖ فَإِنۡ خِفۡتُمۡ أَلَّا يُقِيمَا حُدُودَ ٱللَّهِ فَلَا جُنَاحَ عَلَيۡهِمَا فِيمَا ٱفۡتَدَتۡ
بِهِۦۗ تِلۡكَ حُدُودُ ٱللَّهِ فَلَا تَعۡتَدُوهَاۚ وَمَن يَتَعَدَّ حُدُودَ ٱللَّهِ فَأُوْلَٰٓئِكَ هُمُ
ٱلظَّٰلِمُونَ ٢٢٩

Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah . But if you fear that they will not keep [within] the limits of Allah , then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah , so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers.[179]

---

[177] Al- Qur'an. 6:153.

[178] Al-Qura'n 17:34.

[179] Al-Qura'n 2:229.

۞ وَٱلۡوَٰلِدَٰتُ يُرۡضِعۡنَ أَوۡلَٰدَهُنَّ حَوۡلَيۡنِ كَامِلَيۡنِۖ لِمَنۡ أَرَادَ أَن يُتِمَّ
ٱلرَّضَاعَةَۚ وَعَلَى ٱلۡمَوۡلُودِ لَهُۥ رِزۡقُهُنَّ وَكِسۡوَتُهُنَّ بِٱلۡمَعۡرُوفِۚ لَا تُكَلَّفُ نَفۡسٌ
إِلَّا وُسۡعَهَاۚ لَا تُضَآرَّ وَٰلِدَةُۢ بِوَلَدِهَا وَلَا مَوۡلُودٞ لَّهُۥ بِوَلَدِهِۦۚ وَعَلَى
ٱلۡوَارِثِ مِثۡلُ ذَٰلِكَۗ فَإِنۡ أَرَادَا فِصَالًا عَن تَرَاضٖ مِّنۡهُمَا وَتَشَاوُرٖ فَلَا
جُنَاحَ عَلَيۡهِمَاۗ وَإِنۡ أَرَدتُّمۡ أَن تَسۡتَرۡضِعُوٓاْ أَوۡلَٰدَكُمۡ فَلَا جُنَاحَ عَلَيۡكُمۡ إِذَا
سَلَّمۡتُم مَّآ ءَاتَيۡتُم بِٱلۡمَعۡرُوفِۗ وَٱتَّقُواْ ٱللَّهَ وَٱعۡلَمُوٓاْ أَنَّ ٱللَّهَ بِمَا تَعۡمَلُونَ
بَصِيرٞ ٢٣٣

Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do.[180]

وَجَزَٰٓؤُاْ سَيِّئَةٖ سَيِّئَةٞ مِّثۡلُهَاۖ فَمَنۡ عَفَا وَأَصۡلَحَ فَأَجۡرُهُۥ عَلَى ٱللَّهِۚ إِنَّهُۥ لَا
يُحِبُّ ٱلظَّٰلِمِينَ ٤٠

And the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah . Indeed, He does not like wrongdoers.[181]

---

[180] Al-Qura'n 2:233.

[181] Al-Qura'n 42:40.

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ
وَأَشْهِدُوا۟ ذَوَىْ عَدْلٍ مِّنكُمْ وَأَقِيمُوا۟ ٱلشَّهَٰدَةَ لِلَّهِ ۚ ذَٰلِكُمْ
يُوعَظُ بِهِۦ مَن كَانَ يُؤْمِنُ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ ۚ وَمَن يَتَّقِ ٱللَّهَ يَجْعَل
لَّهُۥ مَخْرَجًا ﴿٢﴾

And when they have [nearly] fulfilled their term, either retain them according to acceptable terms or part with them according to acceptable terms. And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah . That is instructed to whoever should believe in Allah and the Last day. And whoever fears Allah - He will make for him a way out.[182]

۞ وَإِن كُنتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا۟ كَاتِبًا فَرِهَٰنٌ مَّقْبُوضَةٌ ۖ فَإِنْ أَمِنَ
بَعْضُكُم بَعْضًا فَلْيُؤَدِّ ٱلَّذِى ٱؤْتُمِنَ أَمَٰنَتَهُۥ وَلْيَتَّقِ ٱللَّهَ رَبَّهُۥ ۗ وَلَا
تَكْتُمُوا۟ ٱلشَّهَٰدَةَ ۚ وَمَن يَكْتُمْهَا فَإِنَّهُۥٓ ءَاثِمٌ قَلْبُهُۥ ۗ وَٱللَّهُ بِمَا
تَعْمَلُونَ عَلِيمٌ ﴿٢٨٣﴾

And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken. And if one of you entrusts another, then let him who is entrusted discharge his trust [faithfully] and let him fear Allah , his Lord. And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allah is Knowing of what you do.[183]

وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ ۚ وَأَن تَصَدَّقُوا۟ خَيْرٌ
لَّكُمْ ۖ إِن كُنتُمْ تَعْلَمُونَ ﴿٢٨٠﴾

---

[182] Al-Qura'n 65:2.

[183] Al-Qura'n 2:283.

And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew.[184]

شَهْرُ رَمَضَانَ ٱلَّذِىٓ أُنزِلَ فِيهِ ٱلْقُرْءَانُ هُدًى لِّلنَّاسِ
وَبَيِّنَٰتٍ مِّنَ ٱلْهُدَىٰ وَٱلْفُرْقَانِ ۚ فَمَن شَهِدَ مِنكُمُ ٱلشَّهْرَ
فَلْيَصُمْهُ ۖ وَمَن كَانَ مَرِيضًا أَوْ عَلَىٰ سَفَرٍ فَعِدَّةٌ مِّنْ أَيَّامٍ
أُخَرَ ۗ يُرِيدُ ٱللَّهُ بِكُمُ ٱلْيُسْرَ وَلَا يُرِيدُ بِكُمُ ٱلْعُسْرَ
وَلِتُكْمِلُوا۟ ٱلْعِدَّةَ وَلِتُكَبِّرُوا۟ ٱللَّهَ عَلَىٰ مَا هَدَىٰكُمْ
وَلَعَلَّكُمْ تَشْكُرُونَ ﴿١٨٥﴾

The month of Ramadhan [is that] in which was revealed the Qur'an, a guidance for the people and clear proofs of guidance and criterion. So whoever sights [the new moon of] the month, let him fast it; and whoever is ill or on a journey - then an equal number of other days. Allah intends for you ease and does not intend for you hardship and [wants] for you to complete the period and to glorify Allah for that [to] which He has guided you; and perhaps you will be grateful.[185]

مَا قَدَرُوا۟ ٱللَّهَ حَقَّ قَدْرِهِۦٓ ۗ إِنَّ ٱللَّهَ لَقَوِىٌّ عَزِيزٌ ﴿٧٤﴾

They have not appraised Allah with true appraisal. Indeed, Allah is Powerful and Exalted in Might.[186]

---

[184] Al-Qura'n 2:280.

[185] Al-Qura'n 2:185.

[186] Al-Qura'n 22:74.

إِنَّمَا حَرَّمَ عَلَيۡكُمُ ٱلۡمَيۡتَةَ وَٱلدَّمَ وَلَحۡمَ ٱلۡخِنزِيرِ وَمَآ أُهِلَّ بِهِۦ لِغَيۡرِ ٱللَّهِۖ فَمَنِ ٱضۡطُرَّ غَيۡرَ بَاغٖ وَلَا عَادٖ فَلَآ إِثۡمَ عَلَيۡهِۚ إِنَّ ٱللَّهَ غَفُورٞ رَّحِيمٌ ١٧٣

He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah . But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful.[187]

لا ضرر ولا ضرار فى الاسلام۔

No suffering of damage and no inflicting the damage on others.[188]

إنما الأعمال بالنّيات

Actions will be judged according to their motivating intents.[189]

على اليد ما اخذت حتى تؤدى۔

The hand will remain under the burden of what it took until it repays.[190]

إن الله تجاوزلي عن أمتي الخطأو النسيان وما استكرهوا عليه۔

Allah has declared the absolution of my Ummah of their mistakes and forgetfulness and of what they had to do under duresi.[191]

العارية مؤداة، المنحة مردودة، والدين مقضى، والزعيم غارم۔

The 'ariyah' has to be returned back; so is the gift, the debt is to be repaid; and the guarantor is liable.[192]

---

[187] Al-Qura'n 2:173.

[188] Ibn Majah 2340, 2341, Malik al-Mua'tta Vol. 2 p. 745, Dare Qutni Vol. 3 P. 77, Hakim, Mustadrak, Vol. 2, 57, 58.

[189] Agreed upon, Mishkat, Book of Faith.

[190] Tirmidhi, Abu Dawood, Ibn Majah Mishkat, Chap. al-Ghasb, A'riyah.

[191] Baihaqi, al-Sunan al Kubra Vol. 7. p. 356.

الولد لمن وُلِدَ علىٰ فراشه وللعاهر الحجر۔

> The baby will belong to the wedlock's and for the aduterer are the stones.[193]

لا وصية لوارث۔

> No bequeast in favour of an heir.[194]

المسلمون عند شروطهم إلّا شرطاً حرّم حلالاً أو حلّل حراماً۔

> Muslims are bound by law to fulfill their postulations, exciting those ones that turn a lawful as unlawful or renders as lawful as is unlawful.[195]

الشفعة كحلّ العقال۔

> The right of pre-emption is very much like untying the knot of a rope.[196]

In the same way, this hadith holds great importance in rights and matters in which one party needs some time to finalize the deal such as the *khiyare ruyat, khiyare aib*, the right to appeal against the verdict of the primary judiciary, as is the common practice today. This is to facilitate the termination of the right of demand or prosecution against the party and finalization of the deals in the event of the other party’s failure to demand his right within due time.

البينة على المدعى واليمين علىٰ من أنكر۔

> The burden of proof is on the plaintiff, oath is on the defendant.[197]

What may safely be established after a careful study of the above-mentioned textual expressions, the underlying note of constitutionalism and the ensuing

---

[192] Tirmidhi, Abu Dawud, Mishkat, Chap. Al-Ghasab, Al-Ariyah.

[193] Zilai, Nasabul Rayah, Vol. 4, p. 405.

[194] Dar e Qutni, al Faraiz 466, Nasabul Rayah Vol. 4 p. 404.

[195] Tirmidhi, Vol. 1, p. 121.

[196] (Ibn Majah, *Talab al-Shuf'ah*, Nasbur Rayah, Vol.4, P 176,177) This hadith is clear in suggesting that the right to preemption should be demanded without delay. To most of the jurisprudents, this rule that for the right of preemption immediate demand constitutes a condition. Failing this condition the right will lose ground. This is in order to provide a legal safeguard to the buying party against any possible pains of a longer wait.

[197] Al-Baihaqi, Al-Sunmul Kubra, vol, 10 p. 25b.

results is that the correct use of those texts, remaining within the proper limits of sound and stable reason, may lead a jurist to apply those fewer texts to innumerable cases, and proper solutions to the legal problems may reasonably be sought in their light.

The style of the Holy Qur'an, the primary source of the principles and broad doctrines of the Islamic shariat and Fiqh, is marked by precision and elliptical brevity. It mainly restricts itself to lay down the general and broad outlines, fundamental principles and the tenets of the law and very rarely touches upon the details. Precisely speaking, it is the fundamental principles and the tenets on which are established the whole edifice of the system of justice and the structure of the social life. These broad principles and tenets are actually an intermediary between the human perception and the human nature. The Holy Book of Allah revealed to the world and the never changing truths of law and the eternal varieties are fit to all times and climes. Although shorter in number are the verses of the Qur'an which deal with the practical human conduct, they do cover the most of the general rules and the emerging details.

The Second Age: The Age of the Khilafat-e-Rashidah (the earliest phase of the Caliphate)

In the immediate aftermath of the age of the Holy Prophet Islam conquered more realms and its light began to spread far and wide and the territories of Islam began to enlarge beyond measure. The people of all races and countries started to come to the fold of the true religion of Islam. This welcome state of affairs gave birth to many hitherto unfaced problems which had not been directly addressed by the Qur'an and sunnah and there emerged out an stressing need for a wide use of the analogical reasoning in order to systematically derive the solutions to the confronting issues and problems. Thus being the origin of the juristic analogy in the Age of the companions, though some learned Companions were granted permission to meet the emerging problems through exercising the analogical reasoning to find solutions to the problems they had in hand. The juncture of the battle of Qurazah offers the best example of the companions exercise of the analogical reasoning. As to the time of offering the *Asr* prayer, there emerged out a clear disagreement in the opinion of the Sahabah Muadh bin Jabal, a notable Ansari Companion, was sent to Yaman by the Holy Prophet himself with the authority to exercise his reason and opinion on condition that the confronting problem had no express solution in the Qur'an or his *sunnah.* Ali bin Abu Talib, likewise, exercised the method of reasoning to adjudicate some legal cases and was applauded by the Prophet as *Aqzahum Ali* (Ali is the best adjudicator)[198]

In extracting the rules of law from the Qur'an and sunnah the Companions followed the principles of analogy and consensus. That is, first of all they made recourse to the Book of Allah. They acted upon it if they found solution to the confronting problem in it expressly. If not, they moved to the *ahadith* of the Holy Prophet to solve their problem. If they failed in solving the problem in hand, they applied themselves to exercise the method of anological reasoning in the light of the broad principles of the shariat and the fundamental tenets of Islam in order to find a solution to the problem, quite in the manner of a judge who normally adjudicates the cases in accordance with the articles of law, but if the law fails to furnish a solution to him in any given case, he is permitted to apply his opinion to find a proper and just solution to the problem. So was the practice of the Prophet's Companions.

Defining the Companions' juristic opinion, Hafiz Ibn al Qayyim says:

> "Encountered with the contradicting arguments vis-à-vis a problem the result of a sound thinking to reach at an agreeable and sound solution is termed 'opinion."[199]

Then he classifies it into three ones: (1) right, (2) invalid, (3) doubtful. Then he proceeds to give a description of the characteristics of each type of opinion. So because of that on occasions the companions decried the 'opinion' in some cases, and on the other hand they followed and acted upon the opinion.

A comprehensive analysis of the jurists work carried out by the companions during this age leads us to admit the following two characteristics of the age of the Khalafat-Rashida.

- The trend of the use of analogical reasoning flourished and the learned Companions generally resorted to it.
- Collective use of the device of analogical reasoning turned common through a collective deliberation on the textual expressions of the Qur'an and *Al-hadith* and the Companions were able to reach at an agreeable standpoint towards a number of new issues. In this respect the practice of Haz Abu Bakar al-Siddiq the first caliph, and Haz Umar al Faruq (may Allah be pleased with them) was quite exemplary. In the face of the new

---

[198] (Illamul-Muwaqqiee'n Vol. 1 P.20, Mishkat, chap, Manaqib al Ashr 66)

[199] Illarmul- Muqqieen vol. 1 p.76.

problems they, generally speaking, would summon the Companions to collectively deliberate on the problems and issues in hand.[200]

From among the issues and the juristic problems solved by the *Shaikhain* (Haz Abu Bakar and Haz. Umar) the prominent ones include the heirship of the orphan grandson, spending the amount of Zakat on the *muallafatul qulub*, temporary suspension of the punishment of cutting off the hand of the thief, distribution of the lands of Iraq and Egypt among the *mujahidin*, to mention only a few.[201]

Much as there existed individual differences of opinions among the Companions in this age *vis-a-vis* the same issue and this difference lasted till the demise of the differing Companions, yet during the Caliphate reigns of Haz. Abu Bakar and of Haz. Uamr these differences were relatively less in number. The differences got widened during the period that followed the period of Haz. Umar al-Faruq (*Razi Allah anhu*).

Third Age : (From the First Century of Hijrah up to the Beginning of the Second century of Hijrah)

This age is of the systematic establishment of the Fiqh. Towards the end of the period of the Caliphate of haz. Usman bin Affan, the Third Caliph, many of the learned Companions left Madinah, the centre of Islam, under various reasons and settled in different areas of the domain of Islam. Quite naturally, wherever they went and settled, their juristic views and the Fiqhi perceptions accompanied them, and people accepted them. Hence the emergence of the schools of the Islamic jurisprudence, and difference of opinions and the diversity of outlooks between the *Tabieen*. To quote Hafiz Ibn Qayyim,

> "Throughout the Islamic territories the Fiqh got published in the following way: in Iraq thorugh Abdullah bin Masud, in Madinah through Zaid bin Thabit, Abdullah bin Umar and their students and disciples; in Makkah through Abdullah bin Abbas and those benefitted from his juristic knowledge and studied at him."[202]

During this age, stretched over half a century or so, the students and disciples of the Companions, who exerted great juristic influence over different areas and built up a strong historic repute, are Saeed bin al-Musayyib in Madinah Munawwarah, Ata bin Rabah in Makkah, Ibrahim Nakhai in Kufa, Hasan Basri in Basra; Makhul in Syria and Tawus in Yeman. After them their disciples and students inherited their knowledge of fiqh and disseminated their teachers' juristic traditions in the areas of their influence. In the same age took their origin the two new schools of Islamic jurisprudence, that is the *Ahlul Hadith* and the *Ahlur Ray* (the people of opinion). Madinah and Iraq were respectively regarded their cradles. So far as the Ahlul-Hadith school was concerned, it primarily was given to seek solution to all the issues and problems directly in the light of the *ahadith* and *athar*. This resulted in the fabrication of *ahadith* and the *Muhaddithin* had to develop the science of *hadith* in order to distinguish between the original and the fabricated *hadiths*.

---

[200] Ibid, p. 64.

[201] Ibn Jauzi, Seerat Umar bin al-Khattab, P69, Shah Wali Allah, Izalatul Khifa Vol.1p. 154 Illamul Muwaqqien, Vol. 3 p 34.

[202] Illamul Muwaqqieen vol. 1 p.23.

In sharp contrast, People of Opinion would apply, in absence of clear *Al-hadith* vis-à-vis a problem, their opinion and their analogical reasoning and the deliberative power to deduct proper solutions to the problems in hand. In other words, the preferred practice of the *Ahlur Ra'y* was to resort to analogical reasoning if they failed to fined correct and reliable *ahadith* to solve the problem in hand. To speak the truth, the Ahlur Ray had got the spirit of the Islamic shariat, for it was obviously impossible to find clear textual expressions of the Qur'an and the hadith in respect to all the emerging problems and issues and thus to keep abreast of the constantly changing conditions. Had they failed to do so, the result would have been either to express inability of the Islamic law vis-à-vis the issues and problems having no clear answer and solution in the texts of the Holy Qura'n and hadith. Expression of inability of the Islamic Shariat would have sent a negative message about it, or to fabricate new hadiths and disseminate them amongst the ummah and projecting them as part of the law of Islam. Quite obviously, the latter option would have been worse still. This would have distorted and deformed the reality of the Islamic Shariat, rendering it extremely difficult to distinguish between the facts and fancies. In short, it was the practical problems of the real life which forced the people of opinion or, more technically, the *mujtahidin* and the experts in the laws of Islam, to apply themselves to a deeper study of the textual expressions of the Qur'an and hadith and make their best endeavor to fathom the depth of the causes and reasons and in the expediencies and objectives at work behind the laws of Islam. Having done so, they were able to deduct solutions for the newly faced affairs and cases. It was the welcome efforts and painstaking of the people of opinion that the world was able to receive the corpus of the law of Islam in a neatly arranged form and the Islamic Fiqh to the pace of its overall development in an uninterrupted manner.

In the same age the act of *ijtihad* took various forms such as *qayas* (anology), *istihsan* (juristic preference) *istislah*, etc. Against the rising tide of *ijtihad* and qayas there appeared a class of people called Ahluz-Zahir, who strongly opposed the use of the devices of *qiyas* and *ijthad*. Dawud Zahiri and Ibn Hazam Zahiri belonged to the same class. Strangely enough, when the Zahiri Ulama failed to meet the emerging problems merely on the strength of clear textual expressions of the holy Qur'an and hadith, they too resorted to the same device with the denouncement of which they had launched their movement. In the same age emerged the trend to differentiate between the meaning, connotations and scope of *ilm* (knowledge) fiqh. Earlier, the ilm was applied to the knowledge of the holy Qur'an and the hadith, while the term 'fiqh' stood for the understanding of the Qur'anic texts and those of the *ahadith* and deriving the solutions of the emerging problems and issues. Henceforward it assumed the meaning of narration, tradition and transmission of that knowledge, while the fiqh turned as synonymous to perception and the critical study of that corpus of knowledge. The knowledge inherited from the Holy Prophet other than the Qura'n began to be referred to by two different terms of *sunnah* and *hadith*.

During this very age the Shiaite fiqh emerged and developed. Needless to say, the Shiate fiqh, excepting the Zaidi fiqh, is very much different from that of the Ahlus Sunnah. The Zaidi fiqh is related to Zaid bin Ali Zainul Abidin, a great *imam* and highly venerable man. It is said that Imam Abu Hanifa is from among his students.

The Fourth Age : (From the Beginning of the Second Century till the Mid of the Fourth Century of Hijrah)

After the establishment of Fiqh in earlier three ages, this age is marked by an unbroken and impressive development of the Islamic *Fiqh*. Various *fiqhi* schools, the primary concept of which had already come into being during the preceding ages, took their detailed form during this age. From among those schools the four celebrated ones deserve special mention here. They are the following:

THE HANAFI SCHOOL

The Great Imam

Kufah in Iraq was the seat of many a Msleim jurist. In the period of the Orthodox caliphs, the Companion 'Abdullah ibn Masud (d. 32 A.H.) was sent by the Caliph Umar to Kufah as teacher and judge. He was a Companion of the Prophet, well-versed in the traditions and a jurist. After his death his students and their students achieved great prominence. These men included such figures as 'Alqamah al-Nakhi, Masruq al-Hamadani al-Qadi (judge) Shurayh, Ibrahim al-Nakhi, Amir al-Shabi and Hammad ibn Abu Sulayman,

It was in the city of Kufah that the Hanafi school came into being. Its founder, Abu Hanifah Numan ibn Thabit of Persian extraction, known as the Great Imam, was born in Kufah in the years 80 A.H. (699 A.D.). He began his academic life by studying scholastics and he was later tutored the jurisprudence of the Kufah school under the guidance of Shaykh Hammad ibn Abu Sulayman (d. 120 A.H.).

In addition to his academic life he was a textile merchant. His training in Mislim scholasticism and his merchant career gave him an unusual ability to use the rules of reason and logic in the application of shariah rules to the practical matters of life and to broaden those rules by means of analogy and equity (*istihsan*). Thus his school came to be known as the school of the People of Opinion (Ahl al-Ray).

He was reported to have said. 'This knowledge of ours is opinion; it is the best we have been able to achieve. He who is able to arrive at different conclusions is entitled to his opinion as we are entitled to our own".[203] He also said another time, "if I do not find my answers in the Book of God or in the traditions of the Prophet, I would seek the views of the Prophet's Companions from whose opinion I would not deviate to the opinions of others. But when it comes to Ibrahim, al-Shabi, Ibn Sirin, al- Hasan, Ata, and Said ibn Jubayr, well, they are people who had resorted to independent interpretation and I would do likewise".[204]

Imam Abu Hanifah was known as the Great Imam because of his profound knowledge and learning. Of him Imam al-Shafi said "Anyone who seeks jurisprudence ought to be a student of' Abu Hanifah".

Abu Yusuf said of him, "We used to disagree on a case and would come to Abu Hanifah. As though bringing it out of his sleeve he would impart to us the answer. [205]

Towards the end of the Umayyad Caliphate Ibn Hubayrah, the Governor of Iraq, offered Abu Hanifah the post of judge, but he declined it and for so doing was beaten. During the Abbasid dynasty Abu Jafar summoned him to Baghdad and offered him the post of judge, but he refused again and served a prison sentence until his death in the year 150 A.H. (767 A.D.).[206] There was speculation that his imprisonment had been the result of his dissatisfaction with the policy of those in power. Others had it that he had been one of those who were firmly convinced that acceptance of government posts would lead to catastrophe and would imperil both religion and dignity.

In the field of traditions Abu Hanifah was very strict in investigating their authenticity and would accept only those ones, the genuineness of which he had established beyond doubt. Despite his meticulous care in investigations and selection, his companions and followers worked out many compilations of traditions on his authority.

Chief justice Abu al-Muayyad Muhammad ibn Mahmud al-Khawarizmi (d. 655 A.H.), compiled in one volume entitled Jami al-Masanid,[207] 15 works of traditions carrying the authority of Abu Hanifah. Thus we are unable to accept

---

[203] Shahrastani, Milal, II, 39.

[204] Ibn 'Abd al-Barr, Intiqa, 143.

[205] Ibid, 136, 138.

[206] Arnus, Tarikh, 72 ff., and Khatib, Tarikh, XIII, 326 ff.

[207] For these collections of traditions (musnads) see 'Abd al-Qadir, Tarkh, I, 222.

Ibn Khaldun's contention that Abu Hanifah had accepted only 17 sayings of the Prophet.[208]

Exercise of Reason

Thus judicial verdicts started during the days of the Prophet (peace be upon him). We do not know the number of people *(muftis)* who propounded the law, but the name of Abu Bakr is clearly mentioned in this regard in the historical account of the period. He was nominated by the Prophet (peace be upon him) as a *mufti.* It is possible there were other who were also entrusted with the same task. With the expansion of the Muslim commonwealth the number of judges naturally increased, particularly in Yemen, which was a large province and, in that period, was intellectually Now we will take up another aspect of the development of Islamic law. Part of it has been conveyed to us clearly by the law-givers i.e. Allah and the Prophet (peace be upon him). There is no question of man attempting to make such a law. In case the Qur'an and *Hadth* are silent on some issue, as was evident from the tradition about Mu'adh Ibn Jabal, we can try to deduce and appropriate law through the exercise of our own reason.

Such an assignment can be undertaken only by experts. A physician or a baker who has nothing to do with law-making will not be able to contribute much. There is a category of people in the Muslim society which administers law and there is another which expounds it. The first is a judge and the other is a *mufti* who gives a ruling but does not enforce law. A judge enforces laws in a dispute between two parties but a *mufti* merely elucidates and explains the issue, he does not enforce the law. The difference notwithstanding, both function as subsidiary law-makers. The basic law is provided by the Qur'an and the *Hadith.* In case they are silent, these people exert their own reason and try both to expound and enforce law.

Let us consider an example. The Qur'an has fixed a punishment for theft. But if a person steals a shroud of a dead man who cannot defend himself the jurists do not consider it a theft. What, then, is the penalty for stealing a shroud? Does it fall under the law governing ordinary theft or does it need another law? Since the crime is not specifically covered by the Qur'an there is no way to discover a law except by deduction, and exertion of one's reason and intellect. In such a case, our jurists try to deduce a law. We do not propose to go into the details of this process. We will merely cite and example in order to bring out the situations in which our jurists, *muftis* or judges need to discover and expound a law thus contributing to its development.

---

[208] Ibn Khaldun, Muqaddimah, 388.

There was law about theft but there was not law specifically laid down about the theft of a shroud. This law was deduced by our *muftis* and judges. The deduction then became part of our law and contributed to its development. This process started during the time of the Prophet (peace be upon him). We come across a clarification in a tradition. It is narrated that the Prophet (peace be upon him) had told his people that if they needed to enquire anything they should approach Abu Bakr, who was an authority on law. The Companions, instead of bothering the Prophet (peace be upon him) on every matter of detail, went to Abu Bakr with their enquiries. He had the permission of the Prophet (peace be upon him) to pronounce on minor issues. In the event of major problem, however it is obvious that he consulted the Prophet (peace be upon him) before giving his own ruling. In cases where the Prophet (pace be upon him) had already given a ruling, Abu Bakr merely reminded the Companions of its existence and drew their attention to it.

very advanced.

The people of Yemen were not nomads; rather, they lived in settlements and engaged in agriculture and trade. More that one official dealt with justice. There was the governor who was assisted by other officials. The name of Mu'adh ibn Jabal was mentioned a short while ago. He was both a governor and a judge. It appears he was also the inspector-general of education. Tabari relates that one of his duties was to tour the villages and impart education. Possibly he opened schools in villages and taught the Qur'an to the people. He visited various regions of the province and his duty was to provide instruction.

One of the judges sent to Yemen was Abu Musa al-Ash'ari We mention his name in particular because his letter of appointment has been preserved in history. We find that the principle of administration required an official letter of credence, stating that a particular person was being assigned a particular office and that the people concerned should treat him as an accredited representative of the Prophet (peace be upon him). Disobedience to the official thus appointed would amount to disobeying the appointing authority. The letter of appointment given to judges also mentioned their duties. this procedure also dates back to the time of the Prophet (peace be upon him) and the directive given to 'Amr ibn Hazm is also extant.

We have already mentioned the primary sources out of which Islamic Law developed in the period of the Prophet (peace be upon him). Two new elements – the *mufti* and the *qadi* – were added to them. The *qadis* or the judges are usually in need of laws. They have to decide every case keeping in view its peculiar circumstances and position. There are a number of instances when a governor or a judge referred the matter to the Prophet (peace be upon him) and sought his advice. And on many occasions governors or judges used their discretion and decided accordingly. In case the Prophet (peace be upon him) did not approve of a decision, he ordered the necessary amendment. Here is an example. There was an old Arab custom that the blood-many of a murdered person was given to the male relative of the deceased i.e. his son, father, nephew, etc. The widow of the deceased was not entitled to a share. When the Prophet (peace be upon him) was informed about a judicial decision about it, he wrote to the then governor of Yemen, Dahhak, and referring to the judicial decision, ordered that the widow of the deceased should also received blood-money in the same proportion in which she would have inherited the property of her late husband. There was no ruling on this issue in the Qur'an, nor was one available in the *Hadith* until this incident took place. This was, therefore, a new law laid down by the Prophet (peace be upon him).

We have already mentioned the two permanent sources of law during the life-time of the Prophet (pace be upon him) i.e. the Qur'an and *Hadith.* To these two, new sources were subsequently added. The Muslims referred first to the Qur'an and then to the *Hadith* for resolving legal problems. In case they did not find a solution in either of these, they took recourse to *ijtibad* or personal reasoning, a course commended by the Prophet (peace be upon him) himself. The principle has been of great value to Muslims. But for it Islamic law would have become static: and finding their own law inadequate, the Muslims might have been compelled to adopt non-Islamic laws. But by the use of reason and *ijtibad,* they were able to meet ever new eventuality with the terms of Islamic law itself.

A directive is available from 'Umar to the judges of his realm asking them to deliberate rather that give an arbitrary verdict and hastily enforce it. If the judges did not know the law on the subject they were required to give a thought to the problem themselves as well as consult the scholars available in their region. This could be a form of collective *ijtihad.* This too was the practice of the Caliphs. There are plenty of instances in which Abu Bakr, 'Umar, 'Uthman and 'Ali adopted the consultative method to resolve a complicated case on which clear instructions were not available either in the Qur'an or the Hadith.

In such cases a general assembly was summoned in the masjid where the Caliph would put the question to the people and ascertain their opinion. Every person had the right to express his views. Big or small, man or woman, everyone could participate in the process of consultation. We mention women because we come across a case during the caliphate of 'Umar. Parents started demanding large sums of money for giving away a daughter in marriage. A prospective son-in-law was confronted with a demand for a specific sum. 'Umar noticed that this hideous social evil deprived many girls of a chance to get married.

'Umar, therefore, ordered a certain sum to be fixed for the gift-money (mabr) payable to the bride. No objection was raised by any Companion of the Prophet (peace be upon him) but one day an old lady got up in the mosque and challenged 'Umar's right to promulgate such an ordinance. She cited a verse from the Holy Qur'an which says: "…If you have given one of them a treasure, take not aught there from …" (4:20) at the time of divorce. She argued that if Allah has allowed men to gift a treasure to woman, 'Umar did not have the authority to supersede or abrogate the law on the subject. 'Umar immediately conceded that the woman was in the right and withdrew his order.

This shows that everyone could raise an issue in the general assembly. The right belonged equally to the scholar and the illiterate, the young and the old, the male and the female. No one was discriminated against. Everyone expressed his opinion and it was accepted if it was supported by a consensus or else it was dropped. In any case, we see both collective consultation and individual judgments given by judges and *muftis* throughout the regime of the Early Caliphate. The process still continues.

Science Muslims spread very early to three continents i.e. Asia, Europe and Africa, they had to deal with a large number of nations with various religions, culture, customs and habits. They had to contend with many a new situation and face fresh problems. Decisions had to be taken in a verity of legal cases for which there was no precedent. An issue arose during the caliphate of 'Uthman. The Holy Qur'an ordains the imposition of a tax called *jizyah* on non-Muslim subjects. The People of the Book are mentioned in the same context. During 'Uthman's caliphate, North Africa, inhabited by Berbers, was conquered. A question arose whether the tax was to be imposed on Berbers. Earlier a similar question had arisen in the days of 'Umar about the Parsis of Iran. The answer was found quite easily because 'Abd al-Rahman ibn 'Awf cited a tradition from the Prophet (peace be upon him) to the effect that Zoroastrians should be treated at par with the People of the Book except that marriage with their women and eating animals slaughtered by them were not allowed.

In the case of Berbers, however, no guidance was available in the Qur'an and no injunction of the Prophet (peace be upon him) could be cited. After due consideration the Caliph ordered that *jizyah* should be levied upon them. The decision was later extended to all non-Muslim subjects. When Muslims reached Sindh, they continued the practice. When they moved farther in the east they levied the tax on Brahmins. In brief, in the words of Abu Yusuf, *jizyab* was imposed on all non-Muslims irrespective of the fact whether they worshiped fire, trees or stones. They were all treated alike. The Qur'anic injunction on the subject was treated as illustrative and not as limitative. The idea was not to limit *jizyab* to the People of the Book; it could also be extended to others.

The School of Kufah

During 'Umar's caliphate an event of considerable legal significance took place. He appointed a learned Companion, 'Abd Allah ibn Mas'ud, as a teacher to Kufah. He was neither a historian nor a Sufi, nor a famous soldier like Khalid ibn al-Walid but he was certainly talented the field of law. He used to teach in Kufah. It is obvious that his lectures abounded in references to law and jurisprudence. When he was sent to Kufah the order of appointment was couched in the following words: "O Muslims of Kufah! I am sending a highly respected Companion of the Prophet (peace be upon him) to you. You should appreciate that in parting with him I am making a sacrifice for your sake. This should give you some idea of his importance".

'Abd Allah ibn Mas'ud kept teaching law until his death. Among the residents of Kufah, he came across a brilliant Yemeni student, 'Alqamah al-Nakha'I, Who proved to be his best pupil, and after the death of 'Abd Allah ibn Mas'ud, succeeded him as a professor of law in the principle mosque of Kufah. After his death another Yemeni, a resident of Kufah and a student of 'Alqamah called Ibrahim al-Nakha'I succeeded him. Kufah acquired a reputation for excellent teaching in jurisprudence.

After the death of Ibrahim al-Nakha'I, his pupil Hammad ibn Abi Sulayman, a non-Arab, succeeded him. He too was an expert in law and taught jurisprudence. At his death, yet another student of his who also was a non-Arab – Abu Hanifah- succeeded him. He was very young at that time but was by far the most brilliant of Hammad's students. He was reluctant to take over but his own class-fellows beseeched him to continue their teacher's task.

Abu Hanifah, a very intelligent man, was fully conversant with human psychology. He suspected that people would not approve of the appointment of a young man to such a high office unless they were encouraged to believe that his lectures would indeed be important. Abu Hanifah, therefore, told his class-fellows that he would agree to teach provide all of them became his students and attended his lectures for at least a year. They readily agreed. When the people saw that even his class-fellows became his students they were convinced of his outstanding ability as a teacher. Besides other qualities, Abu Hanifah was know for his compassion. He always provided financial help to his needy pupils. His reputations, influence and authority gradually grew among the people who held him in great respect and honour. This was the late Umayyad period, a bad time from the political point of view. Terrorism and violence were common. People were seeking to revolt against the terror and tyranny of the rulers. It was a dangerous and difficult period.

We shall briefly mention an incident of the year 120 AH. The grandson of Husyn, Zayd ibn 'Ali Zayn al-'Abidin, was sick and tired of the rulers' tyranny and decided to rebel against the government. Abu Hanifah was very found of him and sincerely wished that he should replace the Umayyad Caliph. One day, Zayd ibn 'Ali told Abu hanifah that he had received assurances of help from the people and was about to rise in an armed rebellion against the regime. Abu Hanifah offered him money but declined to join him, saying that he would have gladly joined him had he been certain that his followers would remain faithful to him until the very end. His apprehensions proved correct. Zayd's followers deserted him. The government arrested Zayd and put him to death. Zayd ibn 'Ali was great jurist and it can be said that Abu Hanifah benefited from his knowledge. The book authored by Zayd ibn 'Ali is called *al-Majmu'fi'l-fiqh.* It is a famous work and is considered the oldest available work on the subject which has reached us. The book has been published. It is significant that sequence of subjects in this book is the same as found in the works of *fiqh* in the subsequent period right up to our own. It begins with a chapter entitled *Kitab al-Tabarah* which deals with subjects such as ablution and bathing. The follow chapters on acts of worship such as prayers and fasts, then transactions, etc. This is the order we find in the work of Zayd ibn 'Ali and which has since been followed faithfully.

Contribution of Abu Hanifah

The Abbasids succeeded the Umayyads. People expected a change for the better but they were deeply disappointed. During this period Abu Hanifah made an achievement which has left the most important and abiding impact on the history of Islamic law.

Eminent jurists like Malik and al-Awaza'i were alive at that time. They produced works of law but this was an individual effort. Abu Hanifah thought of a collective effort in the field of codification of Islamic law. Out of his many students he selected forty who were experts in law and founded an academy. In making his selection he took care to include those who were of various disciplines in the academy. The methodology he followed was to pose a hypothetical question and discuss the problem threadbare. The discussion sometimes lasted a whole month. When, at last, a unanimous decision was reached, the secretary of the academy, Abu Yusuf, would record the verdict. Some of these documents have reached us. They record discussions on a problem in the form of questions and answer.

Two attempts were made at the codification of law during the period of Abu Hanifah- one by the government and the other by Abu Hanifah himself on a private basis. The official initiative was take by Caliph al-Mansu. He wanted to codify Islamic law with a view to introduce it in the Islamic empire. He sent for Malik and asked him to complete his book on jurisprudence because he wished to enforce it as the official law. Malik, who had the fear of Allah in his heart, politely declined on the plea that on man's opinion could not be imposed on everyone. People should have the freedom to disagree.

But the need for codifying Islamic law remained to be fulfilled. This task was performed by Abu Hanifah. He accomplished it after years of hard work, and prepared a code of which it can be said with great confidence that it is more complete and better suited to human needs than the Justinian Code.

There were other jurists in this period and they had their own pupils. The jurists among the Companions were 'Abd Allah ibn Mas'ud, one of whose pupils in the fourth generation was Abu Hanifah. The other Companion was 'Abd Allah ibn 'Umar whose pupil's was Malik, the founder of the Maliki school of jurisprudence. The third Companion was 'Abd Allah ibn 'Abbas some of whose legal opinions were adopted by the Khawarij. The fourth Companion was 'Ali ibn Abi Talib. His jurisprudence has reached us through Zayd ibn 'Ali and the Ithna 'Ashari and fatimi imams. Later follow the pupils of pupils e.g. al-Shafi'I, who is the pupil of Muhammad ibn al-Hasan, who is the pupil of Abu Hanifah and of Malik. Among the students of al-Shafi'I, there is Ahmad ibn Hanbal, and the latter's student Da'ud al-Zahiri, the founder of the Zahiri school. In brief, there is no fundamental difference between Muslims of different theological persuasions as far as the matters of law are concerned. They have been learning from each other and their legal opinions have a great degree of resemblance.

The Companions of Abu Hanifah and the books of Zahir al-Riwayah

Abu Hnaifah's works in jurisprudence were transmitted to us by his pupils.[209] The four most famous of these pupils were Abu Yusuf, Zufr ibn al-Hadhayl ibn Qays, Muhammad ibn al-Hasan ibn Farqad al-Shaybani, and al-Hasan Ibn Ziyad al-Lu'lu'i. Through them the Hanafi school spread to fame and particularly thorugh Abu Yusuf and Muhammad, known as the *Two Imams* and the *Two Companions*.[210] The Great Imam and his companions, thus, faithfully carried out the will of their chief Shaykh Abdullah Ibn Masud: "Be the springs of knowledge and the lamps of night".[211]

Abu Yusuf Yaqub Ibn Ibrahim al-Ansari (113-182 A.H.) was appointed judge in Baghdad and later during the caliphate of Harun al-Rashid became Chief Justice with the authority to appoint judges throughout the 'Abbasid Kingdom. He thus, had the opportunity to propagate the school of the Great Imam in a practical way. In addition, he enriched it by his contribution of *fatws* in the course of his judicial functions, and by judgments based on traditions which he believed to be authentic, and which he received on authority of traditionalists he knew personally. This compelled him on various occasions to disagree with the views of Abu Hanifa.

The sayings of Abu Yusuf occupy a prominent place in the books of Hanafi jurisprudence. They also appear in the latter sections of al-Shafi's book 'al-Umm'.[212] Abu Yusuf's book, Kitab al-Kharaj, has come down into us in the form of a treatise which he had prepared for al-Rashid embodying his views on taxation and to fiscal problems of the state. The book testifies to his extensive knowledge of the subject and his depth and thoroughness.

The credit for recording the jurisprudence of the Hanafi school is due to the Imam Muhammad ibn al-Hasan al-Shaybani (132-189 A.H.). He also received his training at the Iraqi school but later he took residence in Madina, where he contacted the People of Traditions and studied under Imam Malik. He distinguished himself in the task of compiling the main books of the school and extracting detailed rules, particularly those relating to the laws of inheritance. He was famous in the analysis of real and theoretical cases, wherein he expanded the system of deduction and induction.

---

[209] Abu Hanifah's Kitab al-Fiqh al-Akbar is a short treatise on dogma. The commentary on it by Mulla 'Ali al-Qari (d. 1001 A.H.), as well as the treatise itself, was published in Cairo, 1323 A.H.

[210] Abu Hanifah and Abu Yusuf are also known as al-Shaykhan (the two shaykhs), while Abu Hanifah and Muhammad ibn al-Hasan al-Shaybani are known as al-Tarafan (the two ends). See Lucknawi, Fawaid 248.

[211] Maydani, Majma, II, 374.

[212] Shafi, Kitab al-Umm, vol. VII, the section entitled *"Hadha Kitab ma ikhtalaf fih Abu Hanifah wa Ibn Abi Layla 'an Abi Yusuf"*, 87-150, and the section entitled "Kitab Siyar al-Awza'I", 303-336.

The books which Imam Muhammad compiled were of two types. The first were called *Zahir al-Riwayah* or books of primary questions. These were transmitted by reliable men on his authority.

The second type of books were written on his authority by less reliable authorities, and were called *al-Nawadir* (Rare Problems).

There are six books of the first type: *al Mabsut*, *al-Jami al-Kabir*,[213] *al-Jami al-Saghir*,[214] *al-Siyar*, *al-Kabir*, *al-Siyar al-Saghir* and finally *al-Ziyadat*.

The six books have been collected in one volume known as al-Kafi[215] by Abu al-Fadl al-Marwazi, better known as al-Hakim al-Shahid (d. 344 A.H.). This collection was later annotated in a book called al-Mabsut consisting of 30 volumes by the distinguished Imam Muhammad ibn Ahmad al-Sharkhsi, Who died towards the end of the 5th century of Hijrah. The committee of the Majallah based its work primarily on the books of Zahir al-Riwayah in laying down most of the rules.

The books of *al-Nawadir* attributed to Imam Muhammad were: the book of Amali Muhammad in jurisprudence, or al-*Kaysaniyat* reported by Shuayb al-Kaysani, the book of al-Raqiyat which comprises cases submitted to him while he held the post of judge of the Raqqa region, al-Haruniyat, al-Ziyadat, and Nawadir Muhammad compiled by Ibn Rustum. The *al-Nawadir* also consists of other books attributed to the founders of the schools. They include al-Mujarrad by Abu Hanifah reported by his pupil, Imam al-Hasan ibn Ziyad al-Lu'lu'i. Muhammad ibn al-Hasan is also the author of the book. The Reply to the People of Madina[216] and the book of *al-Athar* (traditions).[217]

---

[213] Recently published by the Ihya' al-Ma'arif al-Numaniyah Committee Hyderabad, India.

[214] Printed on the margin of Abu Yusuf's Kitab al-Kharaj.

[215] Kitab al-Kafi exists in MS at Dar al-Kutub, Cairo.

[216] Reported by Shafi'I in kitab al-Umm, VII, 277-303, under the title, Kitab al-Radd ala Muhammad ibn al-Hasan.

[217] Also published by the Ihya' al-Maarif al-Numaniyah Committee, Hyderabad, India.

The works of the pupils and those who came after them

After the books of *Zahir al-Riwayah* and *al-Nawadir*, we come to the books of *fatwas* and cases in which later generations of jurists, unable to find precedents in earlier works, did their own interpretation. An example is al-Nawazil[218] by Abu al- Layth Nasr al-Samarqandi (d. 373 A.H).

The companions of Abu Hanifah also had pupils who achieved renown; they included Hilal al-Ra'y (d.245A.H.), Ahmad ibn Muhir al-Khassaf (d.261 A.H.) author of the books al-Hiyal (legal fictions), and al-Jami al-Kabir on conditional agreement.[219]

Thereafter a new generation of jurists, staunch supporters of the Hanafi school, emerged. They included: Abu al-Hasan al-Karkhi (d.340 A.H.) Abu Abdullah al-Jurjani (d. 398 A.H.), Author of Khizanat al-Akmal; also Shams sl-Aimmah al-Sarakhsi, the compiler of al-Mabsut; Ali ibn Muhammad al-Bazdawi (d.482A.H.), author of the book al-Usul; Abu Bakr al-Kasani (d. 587 A.H.), author of the book al-Usul; Abu Bakr al-Kasani (d.587A.H.), author of Badai al-Sanai fi Tartib al-Sharia, Burhan al-Din Ali al-Marghinani (d. 593 A.H.), author of Badai al-Sanai fi Tartib al-Sarai, Burhan al-Din Ali al- Marghinani (d.593 A.H.), author of al-Hidayah, and others.

Al-Hidayah, which consists of four volumes, is one of the most authoritative books in the Hanafi School. Many commentaries have been built upon it, the most renowned one, however, being Fathul Qadir by Ibn Hammam.

This was followed by the period of imitation. A class of jurists emerged who ceased creative work and confined their work to imitation. They abridged former works, annotated them, and explained the annotations. Fatwa's were compiled and writings along these lines increased immeasurably. Abridged versions were given precedence over commentaries and commentaries were given prominence over fatwas.

The later jurists became increasingly dependent upon al-Mukhtasar by Ahmad ibn Muhammad al Quduri (d. 428 A.H.), and on four other books known as the Four *Mutun*. (Here follow their names and the several annotations).

Of the compilation of *fatwas*, the following works became known.

---

[218] MS No. 565 at Da al-Kutub Cairo.

[219] From this book Joseph 'Schacht published two sections: "Kitab Adhkar al-Huquq wa al-Ruhun", and "Kitab al-Shufah". (Heidelberg, 1927 and 1930).

In addition to those mentioned above, a number of later Hanafi works achieved prominence. Chief among which are *Multaqa al-Abhur* by (Ibrahim) al-Halabi and *Radd al-Muhtar* by Ibn Abidin).

This is a brief summary of the jurists of the Hanafi school and their works. This school spread in the Islamic countries more than all the others and was predominant in Iraq during the Abbasid Caliphate because it was the preferred judicial system. It was also the official school of the Ottoman state on which the Majallah was built. It is still the official school for *fatwas* in those countries formerly belonging to the Ottoman Empire such as Egypt, Syria, and Lebanon; It is the predominant school in matters of religious observances for the people of Turkey and other countries formerly affiliated with it. It prevails as well among the Muslims of the Balkans, the Caucasus, Afghanistan, Pakistan, Turkestan, India and China. Likewise, it has adherents in many other countries and its adherents constitute more than con-third of the Muslims of the world.

THE MALIKI SCHOOL

The Imam of the Madina

The territory of Hijaz was the scene of revelation and the cradle of the People of the Sunnah. There emerged a unique school known as the school of the People of Hijaz or of the People of Madina. It owes its origin to 'Umar ibn al-Khattab, his son 'Abdullah, Zayd ibn Thabit, 'Abbas and 'A'ishah, the wife of the Prophet.

The school was later represented by jurists, a number of whom achieved renown: Said ibn al-Musayyab, 'Urwah ibn al-Zubayr, al-Qasim ibn Muhammad, Abu Bakr ibn 'Abd al- Rahman, Sulayman ibn Yasar, Kharijah Ibn Zayd and 'Ubaydullah ibn 'Abdullah.

Madina, home of the Prophet's Hijira, continued after this generation of jurists as the headquarters of the school of traditions. It was the birthplace of Imam Malik ibn Anas al-Asbahi (al-Arabi), in the year 95 A.H. (713 A.D).[220] He lived there all his life and did not leave it except on his pilgrimage to Makkah; he died in Madina in the year 179 A.H. (795 C.E.).

Malik was Madina's most accomplished man of learning. He was also its jurist and its tradition-recounder, so much so that a proverb was coined: "Could fatwas emanate from any other person while Malik is in Madina?'

---

[220] It is also said that he was born in 93 or 97 A.H.

Malik was the teacher of al-Shafi'I, who said of him, "Malik is God's authority amongst His creatures after the Followers. Malik is my teacher and from him I obtained my knowledge. If traditions carry the authority of Malik then hold on to them".[221]

Malik was a courageous man of learning, undaunted in his convictions; he expressed his views without fear of authority. In the propagation of his school neither promises nor threats dissuaded him from his convictions.

He was unbending and tenacious when subjected to persecution for his faith and convictions. This led the *wali* (governor) of Madina, Jafar ibn Sulayman, to order him whipped for the opinion attributed to him that bay'ah (allegiance to the caliphate) would be illegal if obtained under duress.[222]

Malik studied jurisprudence as a pupil of Rabiah ibn 'Abd al-Rahman, known as the Rabiah of Opinion. As a pupil, he studied, under servel men of the traditions like Nafi, the client (freedman) of Ibn 'Umar, al-Zuhri, al-Zinad, and Yahya ibn Said al-Ansari. He stated traditions on their authority and on the authority of other Followers and generations succeeding them, until he became an authority on traditions and jurisprudence.

Malik was the author of al-Muwatta' on traditions, which he arranged according to the topics of jurisprudence. Al-Shafi said of this text, "No book on earth after the Book of God is more accurate than the book of Malik".[223]

It was said that al-Muwatta had appeared in several versions. However, only two have come down to us. The first was the version of Imam Muhammad Ibn al-Hasan, the companion of Abu Hanifah, printed in India. The second was the version of Yahya al-Laythi (d. 234 A.H.) which was printed in Egypt and commented upon by al-Zarqani, al-Suyuti and others.

In this interpretation of the Shariah, Malik used to rely on the Qur'an and the traditions. He would accept those traditions which he believed were authentic even though the tradition carried the authority of only one narrator. Malik used to depend also on the practices of the people of Medina and on the saying of the Companions. In the absence of explicit texts he would have recourse to analogy and to a source of law unique to his school known as al-masalih al-mursalah (public interests).

---

[221] For his biography see Suyuti, Tanwir, I, I-10; Ibn 'Abd al-Barr, Intiqa ff; Ibn Farhun, Dibaj; and Tanbakti, Nayl.

[222] Ibn al- Nadim, Fihrist, 280; and Ibn Qutaybah, Imamah, II, 156.

[223] Suyuti, Tanwir, 6.

His Pupils and followers

The Maliki school is still predominant amongst the inhabitants of Morocco, Algeria, Tunisia and Tripolitania. The The pupils of Imam Malik included the Imam Muhammad ibn al-Hasan al-Shaybani al-Hanafi and the Imam al-Shafi, founder of the famous school which carries his name.

His followers included the narrator of al-Muwatta, Yahya al-Laythi, Asad ibn al-Furat al-Tunisi (d.213 A.H.), Abd al-Salam al-Tanukhi, known as Sahnun from Qayrawan (d.240 A.H.). The following achieved renown in Egypt: Abd al-Rahman ibn al-Qasim (d. 191 A.H.) Abdullah ibn Wahab (d. 197 A.H.), Ashhab ibn 'Abd al- Aziz al-Qaysi (d.204 A.H.) Abdullah ibn 'Abd al-Hakam (d. 214 A.H.), his son Muhammad and others. These were succeeded by yet another generation of well-known jurists but suffice it here to mention the following from the 5th and 6th centuries A.H., al-Walid al-Baji, Abul Hasan al-Lakhmi, Ibn Rushd, Ibn Ruhed (the grandson) and ibn al-Arabi. Also Abu al-Qasim in Jazzi (d.741 A.H), author of al-Qawanin al-Fiqhiyah fi Talkhis Madhhab al-Malikiyah, Sidi Khalil (d.767 A.H.) author of the famous al-Mukhtar, al-Kharashi(d.1101 A.H.), al-Adawi (d. 1189 A.H.) and others.

The major reference book of the Maliki school nowadays is al-Mudawwaha, compiled by Asad ibn al-Furat, and later edited and arranged by Sahnun, who published it under the name al-Mudawwanah al-Kubra.

Madina was the birthplace of the Maliki school and from there it spread throughout the Hijaz. The people of Maghrib (North Africa) and Andalusia (Spain) adopted it because, according to Ibn Khaldun, the visits of the jurists of those territories were mainly ot the Hijaz', which was the terminal of their journeys. Moreover, Medina was in those days the center of learning. Iraq was not on the route. Thus their studies were restricted to what they could gain from the learned men of Medina. Furthermore, nomadism was prevalent amongst the inhabitants of North Africa and Andalusia, who did not live in a civilization such as was existing in Iraq. In view of their nomadism, they were closer to the people of Hijaz. [224]

school also spread in upper Egypt, the Sudan, Bahrein, Kuwait and has followers in other Islamic countries as well.[225]

---

[224] Ibn Khaldun, Muqaddimah, 392.

[225] Massignon, Loc. Cit.

THE SHAFI'I SCHOOL

The Imam al-Shafi'i

The Imam Muhammad ibn Idris al-Shafi' of the Quraysh tribe, (the tribe of the Prophet) was born in Gaza in the year 150 A.H. (767 A.D.) and died in Egypt in the year 204 A.H. (819 A.D.). He visited many lands including the Hijaz, where he was a pupil of Malik Ibn Anas, and lraq, where he studied with Muhammad al-Shay-bani, companion of Abu Hanifah. He also lived in the Badiyah (the desert), in Yeman, Egypt and Iraq.[226]

During the early part of his academic career he was the follower of Malik and the People of Traditions. However, his journeys and experiences changed his views and led him to begin a school of his own, known as the Iraqi, or the earlier school. After his sojourn in Egypt he retreated from some of his earlier utterances and dictated to his pupils what came to be known as the Egyptian or his new school.

Imam al-Shafi'i was a cultured man, proficient in linguistic matters, in jurisprudence and the traditions, and possessed of considerable practical experience. He was adept at deduction and dialectics, employing penetrating intellect and eloquence. Theses qualities enabled him to integrate the School of Opinion with the School of Traditions; the outcome was a compromise between the Hanafi and the Maliki schools. He accepted the four sources of law; the Qur'an, the sunnah, consensus of opinion, and analogy. He would also accept *istidlal* (deduction, a special method of reasoning). However, he rejected what the Hanafi school called *istihsan* (preference) and what the Maliki school called *al-masalih al-mursalah* (public interest).

His works

Imam al-Shafi'I was the first to compile the sources of law He also wrote in a systematic way on the origins of jurisprudence in his famous treatise al-Risalah, (published with notes in Egypt in 1312 A.H. in 160 pages) This essay discusses the texts of the Qur'an and the sunnah, the abrogated verses of the Qur'an, the obligatory religious observances the defects of the traditions, the prerequisites for accepting a tradition if recounted by only on narrator, consensus of opinion of jurists, independent interpretation, preference and analogy.

---

[226] For his biography see Razi, Manaqib, and Ibn 'Abd al-Barr, Intiqa, 65 ff.

There is no doubt that the most important work of al-Shafi that has come down to us is his book, al-Umm. The book falls into seven volumes and was written in a scientific and dialectical from by his pupil al-Rabi ibn Sulayman. The book has no parallel in the works of those days.

Abu Talib al-Makki[227], in his book Qut al-Qulub, and al-Ghazzali in his Ihya' 'Ulum al-Din[228] and others have claimed that al-Umm was compiled by one of the students of al-Shafi'I, Abu Ya'qub al-Buwayti and was later expanded and rearranged by al- Rabi ibn Sulayman.

Dr. Zaki Mubarak has lately (1934) endorsed this view in a special essay which caused considerable opposition. Replying to Dr, Mubarak, Shaykh Husayn Wali in an article published in Nur al-Islam magazine and al-Balagh newspaper, upheld al-Shafis authorship of al-Umm.

However, we are inclined to agree wit Dr. 'Ali Hasan 'Abd al Qadir (see Tarikh al-Fiqh al-Islami (Cairo, 1942) Vol. I,p. 261 that an investigation of the problem would be incomplete by merely studying the version copied from the manuscript by Siraj al-Din al-Bulqini. It is imperative that the other manuscripts be studied after they have been scientifically edited.

The book 'al-Umm' deals with the various aspects of jurisprudence including transactions, religious observances, penal matters and the law of marriage.

The seventh volume deals with a variety of topics such as the dispute between 'Ali and Ibn Masud and the disagreement between al Shafi' and Malik. It also discussed questions relating to sources of jurisprudence including a reply to those who do not accept the entire body of traditions and the invalidity of preference (istihsan). This section also comprised al-Radd ala Ahl al-Madinah (The reply to the people of Medina) by Muhammad ibn al-Hasan al-Shaybani, the dispute between Abu Hanifah and Ibn Abi Layla and Abu Yusuf's reply to al-Awza'i' *Siyar* (law of war and peace).[229]

Al-Shafi is also author of Ikhtilaf al-Hadith reported by his pupil al-Rabi and Musnad al-Imam al-Shafi,[230] This contains the traditions reported in his major work al-Umm.

---

[227] Muhammad ibn 'Ali ibn 'Atiyah al-Harithi who died in 386 A.H.

[228] Ghazzali, Ihya, II, 166.

[229] VII, 151, 177, 250, 277, 287, 303.

[230] The two books are printed on the margin of shafi'I, Kitab al-Umm.

His students and followers

Students of Imam al-Shaif' in Iraq included founders of new school such as Ahmad ibn Hanbal, Daud al-Zahiri, Abu Thawr al-Baghdadi and Abu Jafar ibn Jarir al-Tabari, a number of his Egyptian pupils also achieved prominence.[231]

The Shafi'I school was later propagated by a group of distinguished men such as Abu Ishaq al-Shirazi (d. 476 A.H) author of the famous book al-Muhadhdhab; the "Great Authority" of Islam Abu Hamid al-Ghazzali (d.505 A.H.), author of many books on sources of law, philosophy and jurisprudence, such as; al-Mustasfa, al-Wajiz, and Ihya Ulum al-Din. Jalal al-Din al-Suyuti).

Egypt was undoubtedly the stronghold of the Shafi' School. It was there that al-Shafi propagated his new school and it was the home of many of his companions, pupils and proponents. There still remain any adherents of al-Shafii in Egypts particularly in rural areas. The Shafi was the official school of the state during the Ayyubid dynasty and for a period of time the post of Shaykh al-Azhar (Rector of al-Azhar University) was limited to the learned of the Shafi' school.

It is still predominant among the inhabitants of Palestine and Jordan and has many adherents in Syria and in Lebanon (particularly in the city of Beirut) as well as in Iraq, Hijaz, Pakistan, India, Indo-China, Java, and among the Sunni inhabitants in Persia and the Yemen.

---

[231] See, Husayni, Tabaqat; Shirazi, Tabaqat; Subki (Taj), Tabaqat, Ibn Khallikan, Wafayat, Ibn al-Nadim Fihrist; and others.

THE HANBALI SCHOOL

The Imam and his pupils

The founder of the fourth Sunni School of Fiqh is Imam Abu 'Abdullah Ahmad ibn Hanbal,[232] who was born in Baghdad in the year 164 A.H. (780 A.D.), and died in the same city in 241 A.H. (855 A.D.). A traveler whose journeys in quest of knowledge and traditions took him to Syria, Hijaz, Yemen, Kufah and Barah, he compiled a major work consisting of a large collection of traditions entitled Musnad al-Imam Ahmad, which comprises six volumes containing more than 40,000 traditions.

Ibn Hanbal was renowned for his aversion to opinion (ra'y) and for his adherence to the strict text of the Qur'an and the traditions. This was true to such an extent that some prefer to include him among the traditionists (Muhaddithin) rather than among those jurists qualified to use independent reasoning (mujtahid). Among those who considered him so was Ibn al-Nadim, who classified Ibn Hanbal along with al-Bukhari, Muslim and other traditionists in the section of his work, Al-Fihrist, devoted to those learned in the traditions?[233] Ibn Abd al-Birr does not mention the biography of this imam in his book al-Intiqa fi fadail al-Aimmah al-fuqaha (Selections in the Virtues of the Imams of jurisprudence). Similarly, neither al-Tabari in his book ikhtilaf al-Fuqaha (The Disagreements of the jurists), nor Ibn Qutaybah in his book kitab al-Maarif[234] made any mention of Ibn Hanbal or his school of law).

This opinion should, without doubt, be rejected as the Hanbali School is considered among the four original Sunni schools of jurisprudence having an independent system of its own as well as characteristic principles in the science of the origins and the branches of the law indeed, Ibn Hanabal was one of the most distinguished of the students of al-Shafi. Later he founded an independent school based on main sources: the texts of the Qura'n and the sunnah, the fatwas of the Companions, if there was nothing to contradict them, the sayings of certain of the Companions when these were consistent with the Qura'n and the sunnah, *daif* and *mursal* traditions (the former type having a weak chain of transmission, while the latter lacks the name of some of the transmitters), and finally, reasoning by analogy (*qiyas* whenever it deemed necessary)[235]

---

[232] See Ibn al-Jawzi, *Manaqib*; and Shatti, *Mukhtasar*.

[233] Ibn al-Nadim, *Fihrsit* , 314, 320.

[234] Ibn Qutaybah, *Marif*, 216ff.

Ibn Hanbal was noted for being unbending in his religion, and very firm in his faith. It was no wonder then that he rejected the theory of the creation of the Qura'n when he was called upon to accept it in the days of the Caliph al-Wathiq.[236] For his uncompromising attitude on this issue he was persecuted, beaten and imprisoned. He was not, however, the only one to suffer this fate. History is full of episodes of intellectual persecution endured by those learned in the shariah, Al-Buwayti, a companion of al-Shafi'i, was imprisoned for the same reasons as ibn Hanbal and died in the prison of Baghdad. We have already seen how Abu Hanifah was imprisoned and how Malik was beaten, for well-known political reasons. It was said that al-Sarakhsi started dictating his book *al-Mabsut* while in prison. Ibn Qayyim al-Jawziyah and his teacher, Taqiy al-Din ibn Taymiyah, both were, likewise, imprisoned in the citadel of Damascus; it was there that the latter died. In the old Roman days moreover, the Emperor Caracala ordered the execution of Papinian, who was of Syrian origin and the undisputed dean of all Roman jurists, because he had refused to issue a legal ruling sanctioning the murder of Geta, brother of the emperor.[237] These and other examples indicate that genuine integrity and true faith do not yield to force and tyranny, and do not fear sacrifice, however high the price.

Included among the followers of Ahmad ibn Hanbal are: Muwaffaq (d. 620 AH), the author of one of the greatest books on Islamic jurisprudence, al-Mughni[238]; Shams al-Din ibn Qudamah al-Mqdisi (d.682 A.H.), the author of al-Sharh al-Kabir, a commentary on the Muqni,[239] Taqiy al-Din Ahmad ibn Taymiyah (621-728 A.H.), the author of the famous *fatawa* and other well-known works and Abu Abdullah Ibn Bakral Zari, the Damascene, better known as Ibn Qayyim al-Jawziyah (d. 751 A.H).

---

[235] Ibn Qayyim, *I'lam*, 23-26.

[236] Amin, Duha al-Islam, II, 235 and III 36 ff.

[237] Girard, Textes, 67.

[238] Before al-Mughni was printed the author of al-Manar (Muhammad Rashid Rida) said, "If God grants that al-Mughni be printed, I will die with the belief that Muslim jurisprudence will not die." Al-Manar, XXVI (1344 A.H.), 278. The book was subsequently printed in Cairo in 12 volumes under the auspices of the late king Abd al-Aziz Ibn Suud.

[239] Al-Sharh al-Kabir was printed on the margin of al-Mughni.

Notable Characteristics of this Age

- This age is known for the birth and intensification of a tension between the *Ahlul Hadith* and the *Ahlur Ray* as to the interpretation of the Holy texts. But with the passing of time the rising tide of tension receded. Most of the Fuqaha and interpreters used both the hadith and fiqh to meet the emerging questions. Imam Muhammd bin Hasan al Shaibani, for instance, reached Madinah and learnt the Mu'atta from Imam Malik, the author, Imam Muhammad bin Idrees al Shafie learnt hadith from Imam Malik and fiqh from Imam Muhammd. Imam Abu Yusuf, a noted and highly accomplished student of Imam Abu Hanifa, journeyed to Madinah, met Imam Malik and benefitted from his vast knowledge. In short, the gulf of difference which had got widened in the earlier phase of this age became narrowed so much so that each one embraced the other, to use the beautiful expression of the late Sheikh Abu Zuhra of Egypt.
- During the same age compilation of the Islamic Fiqh took place. Imam Abu Hanifa's pioneering initiatives laid down the foundation stone of the act. The role of Imam Muhammad's works, of Imam Malik's Mu'atta and of Imam Shafie's al-Umm too holds fundamental import in this regard.
- During the same age the science of jurisprudence developed and was compiled in the light of the principles of inference laid down by Imam Abu Hanifa. Imam Abu Yusuf wrote a book on the science of jurisprudence. To our dismay, this book fell into extinction during the early ages of the Islamic history. Then, taking into account the fiqh developed in Iraq and the one which developed in Hijaz, Imam Shafie authored his book Risalatul Usool, which is regarded the oldest one on the subject in the whole corpus of Islamic jurisprudence.
- In this age the juristic terminology attained the status of an independent discipline of jurisprudence and a great number of the juristic terms was coined.

- This age is also known for the rise of the Hanafi school of jurisprudence throughout the world of Islam. The Hanafi Fiqh got the status of the 'official school'. First time in the history of Islam Imam Abu Yusuf was crowned with the office of Qazi al-Quzat (chief justice) and the judges appointed by him got ascendency and prominence in the courts of Law.

CHAPTER 9

FIFTH AGE AND ITS CHIEF CHARACTERISTICS (From the middle of the fourth century A.H. upto the middle of the seventh century A.H.)

In this age the act of absolute unrestricted inference stopped and was substituted by partial and restricted inference. Juristic researches and their annotations continued with great enthusiasm. Each school of jurisprudence bred such scholars and authors in great number and the scholars served their own schools and tried to find solutions to the new questions remaining within the confines of the school they belonged to and exerting themselves to the partial inference. In the same age it became a common opinion that the door to an absolute inference got closed under the excuse that the men of Islamic learning and piety like those of the past were no longer available. Should this activity of high implications and much grater responsibility was left to continue unrestricted, it was feared that incompetent pretenders to the inference would harm the splendid edifice of the Islamic jurisprudence erected by the great God-fearing Imams of the past centuries along sounder scientific principles in the light of the tenets of the Islamic Shariat.

An analysis of the conditions that prevailed in this age brings before us more than one reasons which prompted some ulama to adopt the opinion of closing the door of inference.

- Partisanship. In most of the ulama, apart from the fact to which school they belonged, strong partisan prejudice had crept This quite obviously, led them to serve their sectarian fiqh in heritance rather than serving the cause of absolute inference.
- Some held that the office of *qadha* (Judgeship) also contributed to the origin of the said opinion. In the past, the preferred practice of the caliphs was to appoint the men of deeper Islam Learning and noted scholarship to the offices of *qadha* and judgeship. But when the men of so high scholarship became very rare, the caliphs had to appoint the muqallidin to those offices so that they might be useful for them by issuing order and administering justice along the lines and principles of a specific school of jurisprudence. This also led the scholars of the age to adopt the *taqlid* leave the practice of *ijtihad*. Lack of trust and confidence in the caliphs also played a role behind the practice of the caliphs.

The caliphs, too, held that the competent and trustable ulama were not commonly available. Entrusting the important office to the people not properly competent and qualified was bound to undermine the trust of people in the judicial mechanism. Therefore, in order not to let develop such a situation of mistrust, the Islamic governments decided to seek refuge in *taqlid* and in appointing to the offices of the government the *muqallid* ulam.

- In addition to the above reasons, a yet another reason leading the people to seek refuge in the *taqlid* was the availability of the four famous and well-pubishled schools' written corpuses in well-arranged and compiled forms, which facilitated a fuller benefit from them without facing hardships. This indeed was an easier option, while the *ijtihad* a harder option. For the majority of the men of Islamic learning and scholarship it seemed difficult to tread upon the path of a painstaking activity like *ijtihad*. In earlier ages of the Islamic history the ulama and scholars had to make recourse to analogical reasoning due to they had no answers to the new questions and problems. So, the majority of the *mut'akhirin*, preoccupied with the idea that the forerunner men of Islamic learning have already produced the principles and detailed answers to the questions that might arise in the times to come, decided to cling tightly to the way of *taqlid* and restrict, for the most part, their attention to the principles discovered by the *mutaqaddimin* and to the answers furnished by them without studying the Qur'anic texts and the Hadith provisions independently. Thus the act of *ijtihad* turned out to them an uncalled for act for which there was no justification or reason to take pains. Only partial and individual *ijtihad* continued and the men of Islamic scholarship continued explaining the shariah position on the rising issues within the boundaries of their own fiqhi schools.
- A yet another reason contributing to the opinion of closing the door of *ijtihad* was the faith of the *mut'akhirin* in the *mutaqaddimin*, largely created by the overwhelming thought of the *mutaqaddiimin's* presupposed superiority both in respect of time and knowledge. Latter ages, according to the thinking of the *mut'akhirin*, very rarely saw the people of knowledge and piety of the standard of the *mutaqaddimin*, so they thought it better and more prudent to repose their faith and trust in the men of the earlier ages rather than in those who appeared in latter ages.

To our surprise, the *mutaqaddimin* never asked the people or rosesd them to follow them and submit to the results of their schcolarship. They rather their tried best to preclude them from enticing them and to apply themselves to the cause of knowledge of religion. The trend of *taqlid* became popular on its own and the people even their contemporaries found no option other than submitting to the greatness of the *mujtahidin*.

- In this age the science of jurisprudence too flourished and a number of important works appeared.
- The acts of preference and derivation and emendation of the fiqh corpuses too developed during this age Mary great books on *fatawa* were compiled.
- This age is also known for the juristic scholasticism and there existed many people of great learning who were known for their great enthusiasm in this respect.

Sixth Age : This age takes its start from the middle of the seventh century A.H. and lasts till the eighties of the thirteenth century A.H.

This age is of sterility, stagnation and inactivity in terms of scholarly investigation of the sources of the Islamic law and the exercise of independent reasoning. The act of *ijtihad* research, derivation of the rules directly from the sources and the refinement of the available fiqhi material turned a thing of the past and became restricted only to a few men of Islamic learning. Rather than taking pains in carrying out scholarly investigation into the sources of the shariah to meet the rising contemporary issues and complex questions, people of learning, generally speaking, turned towards unimportant things. This perhaps was due to the increasing sense the shariat was no more in need to be served the way the earlier scholars did. Preoccupied with the thought, the general trend, which set in the near-total majority of the men of Islamic scholarship, began to apply them to the emendation and systematizing the juristic heritage. Hence developed a new genre of writing to preserve the juristic heritage received from the pious predecessors. By this new genre we mean the elliptical style of writing the compendious texts. Primarily this was in keeping with the need of committing them to memories in order to secure them and to cater for the needs of the Ulama, students and the *qadhis*. Although the text-writing was an already-known practice in respect of other branches of Islamic knowledge, the writing of the fiqhi texts started during this age, and along the lines and principles of their specific schools, the fuqaha took part in the campaign of the text writing and this style reached its pinnacle. This indeed was a taste peculiar to that age and the importance of which must not be excluded altogether.

The elliptical style of the seventh Hijrah century of writing the juristic texts has been denounced by some of our contemporary authors. This opinion, perhaps, has been formed in haste, primarily due to ignorance of the scholarly tastes and traditions of that age. In our age of ease and comfort those juristic texts seem to us ambiguous, more complex and confused. But in those days this was a commonly acceptable trend and a respectable and appreciable literary style. The criticism of that style by the scholars of our contemporary age is uncalled for and imprudent and smacks of disrespect towards those Ulama and scholars who served the cause of the religion of Islam in a way they considered better and more useful.

Editing and compilation of Juristic applications and preparation of the books on al *fatawa*

During this age the topic-wise compilation of the juristic inferences and the preparation of the books on *fatawa* (legal precedents) took place and a great number of the men of Islamic learning of the age carried out this self-imposed but necessary task with great enthusiasm. Although the work on this front had already begum during the preceding age, in the sixth age special care and attention was given to the execution of this task. Most of the *fatawa* were issued by the state-appointed *muftis* (jurisconsults) and the noted men of Islamic scholarship to whom the general Muslims resorted to solve the questions of religious implication. All these *fatawa* were collected in book form, most of them arranged along the fiqhi chapters. They comprised the ideological foundations and fundamental principles of juristic import, fully able to be applied to the similar future events and questions. In addition, Shariah textual expressions related to the most of the oft-happening events are easily available in these books.

Fatawa Tatarkhanuyah, Fatawa al Hamidiyah, etc, include the important books of this age.

The legality of some juristic rulings emanating from the Sovereign

Islamic jurisprudence, as indicated earlier, covers religious observances as well as juridical rules. We have also indicated that the original law-giver in Islam is the Almighty God Who made His will known through the Qur'an, and through the sayings of the Prophet and that the Shariah is Divine in origin. This is in contrast with Western and contemporary laws, which emanate from the state.

In spite of the Divine origin of the Shariah, the history of the Islamic states proves that the caliph or the sultan did not hesitate to enact laws either directly or by way of interpretation whenever public interest called for such an action.

The legality of such legislation and its binding effect are based upon the Qura'n, the sunnah and the consensus of opinion. The Qura'n says, "O those who believe! Obey God and obey the Prophet and those of you who are in authority" (Qura'n 4: 59). Among "those in authority" are obviously the caliphs and the sultans. Again, the *sunnah* has the following tradition of the Prophet: "He who obeys me obeys God and he who disobeys me disobeys God; he who obeys the *amir* obeys me and he who disobeys him disobeys me; heed and obey even though an Abyssinian slave whose head is like a raisin is placed in command; if one should dislike a certain behavior from his *amir,* let him exercise patience for a person who behaves with disloyalty to his sultan meets with a *jahiliyah* (pagan or inglorious) death; if a citizen finds that his ruler has disobeyed God, let him dislike such acts of Godlessness, but he should not raise his hand in disobedience".[240]

Consensus has also supported this view. The Muslim caliphs had considerable recourse to interpretation, if accepted by consensus, became part of the Shariah.

Aspects of legislation

The bulk of the legislation laid down by the sultans, when there was no provision in the texts, was in connection with new problems arising from social needs and development and particularly in questions of administration such as the organization of government-departments, the imposition of taxes, the collection of tithe, the organization of prisons and other related matters.

Other aspects of this positive legislation were what was known as "shariah policy" and the duties related to *hisbah* (administration of markets and public morals), whereby the sultan, the imam or the governor become the protector of public interest supervising fair dealings in transactions, castigating[241] and punishing criminals to the extent of their crimes, including punishments such as imprisonment, exile or execution in implementation of public policy.[242]

---

[240] These traditions are found in the two Sahihs (of Bukhari and Muslim), and, with minor variations, in other collections. See ‘Ayni, ‘Umdat XIV, 222 and XXIV, 178, and Muslim, Sahih, VI, 13-24.

[241] For the meaning of castigation (tazir) see Mahmassani, *Nazaryah*, I, 129.

Moreover, the caliphs did not hesitate to change the interpretation of rules embodied in the texts if the needs of *shariah* policy or the public interest required that such changes be effected. Examples of such changes have already been mentioned in the precedents of the Caliph Umar, such as the suspension of the punishment meted out to thieves in a year of famine, the suspension of the payment of a part of the alms to "those whose hearts are to be reconciled", even though the Qura'n makes such a provision, and the abolition of the punishment of exile for those found guilty of fornication inasmuch as these persons were joining forces with the Byzantines and becoming Christian, etc.

The caliph was in a position to exercise influence upon the shariah in another way, namely by decreeing adherence to one specific school or interpretation of the Islamic Sharia'h. There are many examples of this in Islamic history. The Umayyad and the 'Abbasid caliphs were militant against all schools opposed to them or to their policies. The Caliphs al-Mansur and al-Rashid strove to make all their subjects conform to the school of the Imam Malik but were foiled in their plans by Malik's opposition. The Fatimids sided with the Ismailiya sect, the Ayyubids with the Shafi'I school, the Iranians with the Imamiyah Shiah, the Yemenites with the Zaydiyah Shiah, the Yemenites with the Zaydiyah Shiah, the Wahhabis with the Hanbali School and the Ottomans with the Hanafi School. We have already seen how the Ottoman caliphs enacted various laws such as the Majallah, which conformed to the Hanafi School, and the Penal Code, Commercial Code and Code of Procedure which were derived from European legislation.

All these precedents gave to the state effective control over interpretation and the interpreters. Thus Article 1801 of the Majallah says, "If an order is issued by the sovereign authority to the effect that in a certain matter the opinion of a certain jurist is in the interest of the people and most suited to the needs of the moment, then action should be taken in accordance therewith. The judge may not act in such matter in accordance with the interpretation of a different jurist. It he does so, the judgment will not be subject to execution". The commission which drew up the Majallah concluded its report and presented to the prime minister with the following: "In questions which have been the subject of legal interpretation, it has been found necessary to act in accordance with whatever order has been issued by the *sultan*. If you approve, we request you to obtain imperial sanction for this code".

---

[242] Ibn Khaldun, Muqaddimah, 196; and Sarakhsi, *Mabsut*, XXVI, 124.

The limits of the sultan's jurisdiction

In modern states there are well-established legislative bodies such as parliaments which enact laws. The head of the state has no authority except to promulgate these laws and put them into effect. In the Islamic states, however, the sultan was exclusively the source of authority. Thus the Ottoman caliphs, before these last reforms, used to issue laws by a mere "royal decree".

Yet the sultan very rarely took decisions on his own without consultation. He was careful to abide by the rules of the shariah and justice, consulting with jurists and men of learning in matters not covered by the texts.

Respect for and adherence to the rules of the *shariah* and justice by those in authority are an essential prerequisite for the claim to obedience from their subjects according to Islamic law. There are many traditions in support of this thesis. Examples are: "obedience is only due in righteous deeds"; "Obedience is a duty unless the thing commanded violates a command of God, in which case there is to be no obedience".[243]

At this point we must draw a distinction between the status of the caliph with the *sunnis* and that of the imam with the *shiah*. The *imams*, in the eyes of the Imamiyah Shiah, are the "caliphs (successors) of God on earth".[244] The caliph in the *sunni* school, on the other hand, is merely the successor of the Prophet among his people.[245] It follows that the *imams* in the shiah school must be obeyed and are regarded as infallible,[246] While the sunni caliph is not regarded as infallible. Sunnis say, "A sovereign should not be obeyed if his command violates a command of God; obedience is only due in righteous deeds".[247]

One of the limits placed upon the jurisdiction of the sultan is embodied in the principle of *shura* (consultation) in government expounded by the Qur'an;

---

[243] All these traditions and others of similar meaning but with slight variations are reported in the Two Shaihs. See 'Ayni, Umdat, XVII, 314 and XIV, 221 and Muslim Sahih VI, 15 See also Suyuti, Jami Saghir, No. 9903, copied from Ibn Hanbal , Musnad; and Hakim, Mustadrak.

[244] Kulini, Usul, 69.

[245] Ibn Khaldun, Muqaddimah, 166.

[246] Shahrastani, Milal, I, 151.

[247] Guzelhisari, Manafi, 330.

"And consult with them upon the conduct of affairs. And when you are resolved then put your trust in God" (Qur'an 3: 159); "…and whose affairs are a matter of counsel" (Qur'an 42: 38). Al-Bukhari related that the Prophet used to consult his Companions in certain matters, and that the caliphs often did likewise, consulting with people of learning concerning matters not explicitly provided for in the Qura'n or the traditions.[248] It is also reported that the Caliph 'Umar was among the foremost of those who followed the practice of consultation in arriving at his rulings and interpretations.[249]

---

[248] Ayni, Umdat, XXV, 78-9; and Muslim, Sahih, V, 157.

[249] Ibn Qayyim, I'Iam, I, 70.

The Extinct Sunni Schools

Besides the four grand Imams of Fiqh, there were several other men of exceptional Islamic learning who distinguished themselves in the higher legal studies of Qur'an and hadith, for example, Hammad bin Abu Sulaiman, who is a prominent figure in the list of Imam Abu Hanifa's teachers, Rabiatur Rai, the teacher of Imam Malik, Ibn Shihab Zuhri, Yahya bin Saed, Imam Jafar al-Sadiq, Zaid bin Ali Zainul Abideen, Imam Auzai, Qazi Abdur Rahman bin Abi Laila, Ibn Shibrama, Lais bin Sa'ad and so on, to name only a few. They occupied a higher position and they excelled in the fundamental areas of the Islamic scholarship. The hadith and fiqhi literature has preserved a good number of their juristic opinions in the light of which we may easily assess their high position amidst their contemporaries. Despite this fact, their juristic schools failed to attract a considerable following and very soon they disappeared. Out of those extinct schools of fiqh the following three ones perhaps are the most notable.

Al-Awza'i School

Al-Awzai was the Imam Abu 'Amr Abd al-Rahman ibn Amr; his family belonged to al-Awza, a tribe of the Yeman. He was born in Balabak (now in Lebanon) in the year 88 A.H., lived in Beirut until his death in 157 A.H., [250] and was buried in the southern part of the city; this spot is now known as the palace of al-Awzai.

He was pious, brave, an accomplished jurist, and an authority on traditions. He was the Imam of Syria, where its people followed his school. Later the school made its way to Spain; however, it died out after the second century A.H. when the Shafi'I school emerged in Syria and the Maliki School in Spain.

The Awza'i school is considered one of the schools of the People of Traditions,[251] averse to opinion and analogy. It is one of the lost schools, since all we know of it is what we accidentally come across in the published books of the other schools.[252] I have heard of the existence of a manuscript on the jurisprudence of al-Awza'I in the library of the Qarawiyin College at Fez in

---

[250] Ibn Khallikan, Wafayat, 275; Ibn al-Nadim stated that al-Awza'I died in 159 A.H.; Fihrist, 318.

[251] Ibn Qutaybah in Ma'arif, 217, wrongly considered him among the People of Opinion.

[252] See Abu Yusuf's "kitab Siyar al-Awza'I in Vol. VII of Shafi'i, kitab al-Umm, And kitab Mahasim al-Masa'i, published by Shakib Arsalan, (Cairo, n.d.), from a MS in the Berlin Library.

Morocco. It is hoped that those in possession of this precious manuscript will publish it as a service to history and to the rejuvenation of Islamic legal Sciences.

The Zahiri School

Daud ibn Ali al-Isfahani, better known as Abu Sulaman al-Zahiri, was born in Kufah in the year 200 or 202 A.H. He was brought up in Baghdad where he died in 270 A.H. At first he was an adherent of the Shafi School and later he founded a school of his own.[253]

His school was known as al-Zahiri (the overt or apparent) because he abided by the literal texts of the Qura'n and the sunnah. He rejected consensus unless it was unanimously approved by all jurists of the nation. He also rejected analogy, unless it was based upon a text, and such sources of law as opinion, preference and imitation. His motto was the Qura'nic verse: "If you disagree over an issue then refer it to God and the Prophet…..".[254] Such reference, he thought, was sufficient in all cases.[255]

Al-Zahiri had many followers, particularly in Spain, until the fifth century A.H. when his following was greatly diminished, and died out completely in the eighth century A.H.

One of the most distinguished followers of al-Zahiri was Ibn Hazm, the Spaniard (d.456 A.H.), a prodigious author, and a great debater. However, he used violent language towards those whose opinions differed from his own; for example, he described the sayings of Abu Hanifah and his followers as being lies and stupidities.

Ibn Hazm's books included al-Ihkam li-Usul al-Ahkam and al-Fisalfi al-Milal wa-al-Ahwa wa-al-Nihal.

Despite this school's adherence to the literal meanings to the texts and its aversion to opinion and analogy, it pioneered on occasions into theories which are similar to modern Western theories. For example, this school is the only one in Islam which stipulates that a poor husband is to receive alimony from his rich wife.[256]

---

[253] Ibn Khallikan, wafayat, I, 175.

[254] Quran, IV, 59.

[255] Ibn Hazm, Ihkam, I, 9; V, 160; and VII, 55-56.

[256] Ibn Hazm, Muhalla, X, No. 1930.

The Tabari School

Abu Ja'far Muhammad ibn Jarir al-Tabari was born in Amul, Ta baristan, in the year 224 A.H., and died in Baghdad in 310 A.H. He distinguished himself in several fields of learning and is author of the famous history that bears his name; he is also author of the great exegesis of the Qura'n.

A travelling jurist, he studied the jurisprudence of Malik, al-Shafi'I and that of the People of Opinion. Later, he founded a new school which spread in Baghdad. His books dealing with jurisprudence included al-Latif, al-Khafif, al-Basit, al-Athar, and Ikhtilaf al-Fuqaha, the latter containing a comparative study of Muslim schools of jurisprudence included al-Latif, al-Khafif, al-Athar, and Ikhtilaf al-Fuqaha, the latter containing a comparative study of Muslim schools of jurisprudence.[257]

These schools ceased to exist in the middle of the fifth century A.H.

THE SHI'AH SCHOOLS

The People of Shi'ah

The schools discussed in the previous chapters are called Sunni, after the people of al-Sunnah. Those people had advocated of Abu Bakr, Umar Ibn Al-Khattab and Uthman Ibn Affan.

They were opposed by the Shiah, a group which claimed that 'Ali ibn abi Talib had a more legitimate claim to the caliphate because he belonged to the family of the Prophet and was both cousin and son-in-law of the Prophet. Moreover, Ali had been the first youth to embrace Islam. The Shiah, further alleged that the Prophet had willed that Ali succeed him. Because this group sided (tashayya'a) with 'Ali, they were therefore called the Shiah (partisans) of the Imam Ali. Today they claim approximately one-tenth of the Muslims of the World.[258]

It is clear that the cause of the split between the People of the Shiah and the People of the Sunnah was political in its origin and it remained so throughout the history of Islam. The main objective of the Shiah was to restore the caliphate to the family of the Prophet, at first from the Orthodox, and later from the Umayyad and ʻAbbasid caliphs. In this respect there is no justification for the continuation of the dispute between the two sects to the present day.

---

[257] Part of Tabari's Ikhtilfaf al-Fuqaha exists in MS at Dar al-Kutb, Cairo, and was published in Cairo, 1320, A.H.

[258] Massignon, Annuaire, 24, 38.

But there were other differences over such things as imam (leadership) of Muslims), interpretation, sources, and matters of religious observances and transactions.

The question of who should be imam caused the People of al-Shiah to split amongst them and to form rival sect. The most important of these sects were al-mamiyah, al-Zaydiyah, and al-Ismailiyah. The followers of all these sects were in agreement, however, that the post of imam should belong to the family of the Prophet. There was no dispute over the first four imams: Ali, his two sons Hasan and Husayn, and Ali Zayn al-Abidin, son of Husayn. But they split over the succession after the four imams. The Zaydiyah upheld the right of Zayd, son of ʻAli, the rest advocated the cause of Abu jafar Muhammad al-Baqir, and after him, that of jafar al-Sadiq. These in turn split into two contending sects. One was al-Ismailiyah, which claimed that the seventh imam was Ismail Ibn Jafar al-Sadiq the other was al-Imamiyah or al-Ithna ʻAshariyah (the Twelve's), which claims the post of imam for Musa al-Kazim, and following him, for ʻAli al-Rida, Muhammad al-Jawad, Ali al-Hadi, al-Hasan al-Askari, and finally the Twelfth Imam, Muhammad, the coming Mahdi.

We shall now discuss briefly each of the three sects.[259]

The Imamiyah Shiah

This group was called al-Ithna ʻAshaiyah (the Twelve's) because it advocated the claims of the twelve imams whom we have just mentioned. It attached to the Imams, and its belief in the coming of al-Mahdi.[260]

The sources of law according to this Shaiah School are the Qura'n, the sunnah and the consensus of opinion. Some of the jurists of this school claimed that inaccuracies had crept into the Qura'n. The predominant view, however, was that no distortions had, in fact, occurred.[261] In the field of traditions the Shiah accept only those traditions whose chain of authority goes back to the family of the Prophet. They term such traditions *al-akhbar* (the news or narratives).

---

[259] Amin, Duha al-Islam, III, 208ff.

[260] Shahrastani, Milal, II, 2ff.; and Amin, Duha al-Islam, III, 215, and 226-249.

[261] Baqir (Muhammad), Wasilat, 61.

Consensus of opinion according to their school is "consensus concerning statements by the infallible imam, and not merely the consensus of jurists on any particular statement".[262] As regards the principle of analogy, it is forbidden according to the akhbariyun group but is accepted by the Usuliyn group.[263]

As regards jurisprudence, the Imamiyah Shiah School is not very much different from the school to be placed with the other four Sunni schools. The differences include such things as mutah, or temporary marriages, which the Shiahs tolerate, and differences over inheritance questions.

One of the most distinguished doctors of this school was the Imam Jafar al-Sadiq (80 or 83-148 A.H.). He was one of the great interpreters known for their honesty, integrity and proficiency in jurisprudence. The school is occasionally attributed to, and named after him thus: Al-Madhhadb al Jafari.

The Imamiyah School is undoubtedly the largest of the Shiah sects. It has thirteen million followers in Iran, six million in India and Pakistan, two million in Iraq, more that two hundred and thirty five thousand in the Lebanon,[264] and approximately eleven thousand in Syria.[265]

It has been the official school of the Iranian state since the beginning of the reign of the Safavid dynasty in 907 A.H (1501 A.D.). There were many attempts in Iran in the 18the century to unite the Sunni and the shiah schools but to no avail.[266]

In Syria and the Lebanon they have their own Shariah Courts, Known as Ja'fari Courts, which look into questions of personal status.

The Zaydiyah Shiah

This school advocated the right of Imam Zayd ibn 'Ali as the fifth Shiah imam, and after him, the right of the descendents of Fatimah, the daughter of the Prophet. Imam Zayd was killed in action (122 A.H.) in his war against the Amy of the Umayyad Caliph Hisham ibn Abd al-Malik. His son Yahya was killed three years later when he staged a rebellion against al-Walid ibn Yazid.

---

[262] Baqir (Murtada), Hall, 44.

[263] Hilli, Tadhkirat, I, I; Baqir (Muhammad), Wasilat, 7; and Baqir (Murtada), Hall, 53.

[264] 156,832 according to the 1932 census.

[265] 10,974 according to the report submitted to the League of Nations in 1934.

[266] Goldziher, Le dogme et la loi de l'Islam, 247-249.

A number of Zaydi jurists distinguished themselves; one of these was al-Hasan Ibn Zayd Ibn Muhammad, known as the "Imam who propagates truth". He became king of Tabaristan from 250 A.H. until his death in 270 A.H.

One of their oldest works is the book entitled al-Majmu. It comprises the narratives (traditions) and the fatwas attributed to Imam Zayd ibn Ali.[267] One of their best known books today is al-Rawd al-Husayn Ibn Ahmad al-Himi (d. 1221 A.H.).[268]

The Zaydi Shiah are restrained in judging the Orthodox caliphs who precede Ali. They endorse the legitimacy of Abu Bakr and Umar's caliphate because they believe that an acceptable imam has a legitimate title to the caliphate even in the face of a superior claimant.[269]

They are the nearest Shiah group to the Sunni schools; its stronghold nowadays is in the Yemen, where it has more than three and a half million followers.

The Ismailiyah Shiah

This is the minority group which rejected the imamate of Musa al-Kazim and advocated the cause of his elder brother Ismail.

The school came into existence in Egypt and was adopted by the Fatimid caliphs from the year 909 to 1171 A.D. Its followers today are divided into two groups: The Eastern Ismailiyah and the Western Ismailiyah.

The former is centered in India and has followers in Iran and Central Asia. Its leader is Amir Karim Shah, better known as Agha Khan (the fourth). His followers regard him as the 49th imam after the Prophet and they present a yearly tithe to him. Their number in British India is approximately one million.[270]

The Western Ismailiyah School on the other hand, is prevalent in Southern Arabia, in the vicinity of the Persian Gulf, and in the mountains of

---

[267] Printed by Griffini, Milan, 1919.

[268] Completed by al-Abbas ibn Ahmad al-Husayni al-Yamani, and printed in five volumes, (Cairo, 1347-1349 A.H.).

[269] Shahrastani, Milal, I,160.

[270] Massignon, Annuaire, 291.

Hama and Ladhiqiyah (Latakia) in Syria. The Ismaili followers in Syria, including the Alawiyin are estimated at 20,500.[271]

The jurisprudence of the Ismailiyah School is not well-known. The chief reference is a book called Da'aim al-Islam (The Pillars of Islam), by Judge Nu'man ibn Muhammad al-Tamimi al-Maghribi (d.363 A.H. 974 A.D.). Some parts of this book, namely those dealing with will and war, were published in the forties of the last century.

---

[271] According to the report submitted to the League of Nations in 1934.

CHAPTER 10

SEVENTH AGE : OTTOMAN LAWS AND THE MAJALLAH

The idea of official codification

We discussed in the previous chapter the emergence of the Islamic schools and their differences regarding the sources and body of jurisprudence. We have seen the dismal situation into which legal activity had lapsed in the era of sterility which followed the golden age. We pointed out how creative work had ceased and how imitation had become prevalent. Abridged texts, annotations, commentaries, codes of fatwas, etc., had increased to such an extent that the study of jurisprudence became a formidable task indeed.

The difficulties were further intensified by the fact that the sariah rules governing transactions had not been officially codified. It is true that the Qura'n was collected in a recognized version during the caliphate of Uthman ibn Affan in the year 30 A.H. (650 A.D.). The traditions, however, were never compiled in this manner; the Caliph Umar had refused the compilation of the traditions for fear they would find favor in the eyes of the people, in preferences to the Qura'n.

The Umayyad Caliph Umar ibn ʻAbd al-Aziz, attempted a compilation of the traditions in the early part of the second century A.H. (eighth century A.D). He wrote to Abu Bakr ibn Hazm asking him to study and write down the traditions that were available. "He was fearful that learning might suffer extinction and that men of learning might pass away". But he was not successful in his plan because he died before the compilation was completed.[272] Similarly the law governing transactions were not written down in a general code; this led to differences in judicial decisions, interpretations and opinions.

---

[272] Suyuti, Tanwir, I, 4.

The attempts of Ibn al-Muqaffa and Abu Ja'far al-Mansur

'Abdullahibn al-Muqaffa (d. 144 A.H.) was a capable writer of Persian extraction, and an accomplished man of letters who distinguished himself by his translations from Persian into Arabic.[273]

He was cognizant of the chaos that characterized the various schools at the beginning of the Abbasid era; hence, he submitted a report to the Caliph Abu Jafar al-Mansur, in a treatise entitled Risalat al Shabah, in which he emphasized the harm resulting from the disparities in interpretations and rules. At the same time, he stressed the benefits that would accrue from laying down a general code of law which would be applicable to all provinces. Such code, he suggested, should draw its principles form the Qura'n and the sunnah. In the absence of explicit text, recourse should be made to opinion in accordance with the dictates of justice and the public interest. The following is an excerpt from his report: "The contradictory rules in these two provinces and in others as well have reached serious proportions and it is fitting that this be brought to the notice of the Commander of the Faithful. If he deems fit to order that those conflicting verdicts be submitted to him in a report together with the arguments of the various groups, whether based on traditions or analogy; if he looks into them and gives his ruling in each case and forbids giving contrary decisions; and, if these rulings are written down in a comprehensive volume; then, we have reason to hope that God might make of these conflicting rules one coherent and correct code, and the integration of the various schools be a prelude to unity in accordance with the will of the Commander of the Faithful and his authority".[274]

This was the proposal of Ibn al-Muqaffa but it was not implemented because of the fear of the jurists and those in authority that errors would be committed in the interpretation of the Islamic shariah. They were unwilling to bear the responsibility of forcing the people to imitate them.

It is said that when the Caliph Abu Jafar al-Mansur performed the pilgrimage in 148 A.H. (765 A.D.), he requested Imam Malik Ibn Anas to compel the people to adopt his school. Malik refused saying that every group had its own predecessors and imams and he would not be inclined to force anything upon them.

---

[273] He translated into Arabic the celebrated work, Kalilah wa Dimnah.

[274] Arnus, Tarikh, 84-85.

The Caliph Abu Jafar repeated his request to Imam Malik during his second pilgrimage in 163 A.H. (777 A.D.). He is reported to have told Malik: "Write down this jurisprudence and compile it in book form, leaving out the excessive harshness of Abdullah Ibn "Umar, the licences of Abdullah Ibn Abbas and the varieties of Abdullah bin Masud. Strive after moderation, compromise, and the consensus of the Imams and Companions, so that we may ask the people to adopt your school and disseminate it throughout the provinces and forbid its contravention".[275] Malik thereupon wrote al-Muwatta to which we referred, but he refused to force his school upon the people.

He made a similar refusal in the reign of Harun al-Rashid.

The Shariah laws remained officially uncodified until the days of the Ottoman state. Those seeking judicial rules and precedents had to go back to various books on jurisprudence and to their annotations and many other books on fatwas.

---

[275] Ibn Qutaybah, Imamah, II, 150-159; and Ibn Abd al-Barr, Intiqa.41.

CHAPTER 11

THE ALAMGIRIYAH

Awrangzeb, one of India's sultans in the IInd century A.H. (17th A.D.),[276] interested himself in the collection of fatwas. He formed a committee of India's leading jurists with Shaykh Nizam as president to "prepare a comprehensive book containing the books of Zahir al-Rawayah (al-Mabsut, al-Jami al-Kabir, al-Jami al-Saghir, etc.), which had been approved by the most distinguished jurists, and the Rare Problems accepted by the men of learning". This they did in a book known as al-Fatawa al-Hindiyah or al-Fatawa al' Alamgiriyah, after the title of the sultan (Alamgir).

It is comprehensive work in six large volumes arranged on the model of al-Hidayah by al-Marghinani which discusses religious observances as well as transactions like the rest of the Islamic juridical books. It was and still is one of the major references in Hanafi Jurisprudence. This semi-official compilation was not intended to be binding and generally applicable like modern legal codes; it was not even similar to modern codes in style and arrangement. What it did comprise was many juridical questions, some real, others hypothetical, with a statement of the prevalent views of the jurists on each question.

The Sources of the Fatawa Alamgiri

In the preparation of the Indian *Fatawa* commonly known as *Fatawa Alamgiri*, the notable works on the Islamic fiqh, particularly of the Hanafi school were heavily drawn upon and used by the committee of the Ulama constituted by Aurangzeb Alamgir, who was deeply interested to see such a comprehensive work on the Islamic fiqh. The reference works included both the published and unpublished ones, manuscripts, fatawa of the trustworthy ulama. To name the important books here:

Sharh Waqaya

Waqaya is one from among the highly acclaimed and trustable works on the Islamic fiqh's Hanafi School. In the middle of the eight Hijrah century one

---

[276] 1028-1118 A.H. (1618-1706 A.D.). See his biography in Sami, Qamus, IV, 3049: and in El, "Awrangzeb".

Abdullah bin Masud wrote an elaborated commentary on *al-Waqaya* which appeared in four volumes. Its abridged version is called *Niqayah*.

Qudoori

A highly credible and briefly written text by Abul Husain Ahmad bin Muhammad Quduri of the fifth century of Hijrah.

Qinayatul Manyah

A good work by Najmuddin Bakhtiyari

Al-Kafi

This is a collection of the judicial decisions incorporated by Imam Muhammad in his celebrated work 'al-Mabsut'.

The collection was compiled by one Shahid Muhammad bin Muhammad al-Hanafi.

Al-Hidayah

By Burhanud Din Ali bin Abu Bakr al-Margining. An authority on the Hanafi School of Islamic jurisprudence, the book is of high import for centuries forms part of the curriculum. The book has also been translated into English by Hamillon. But regrettably, the English translation is not a good attempt. Is an amalgam of errors, mistakes even distortions?

Muniyatul Musalli

By Saeedu Din Kashghari, a very brief but trustworthy work. Shaikh Ibrahim Halabi has written a detailed commentary on it which is commonly available. This commentary bears the name of Ghuniyatul Mustamilli.

Mukhtasar al-Tahavi

This voluminous book was authored by Abu Ja'afar Ahmad bin Muhammad bin Salamat, a highly noted Egyption *faqih* of third century A.H.

Fathul-Qadir

A multivolume work of incomparable value, this book is a detailed annotation on the al-Hidayah of al Marghinami. The book was co-authored by Ibn Hamman, great traditionist, and Mufti Ahmad Shams al-Din.

Muhit e Burhani

Generally known as Muhit Kabir, the book was authored by Burhanud Din Mahamood.

Muhit al-Sarkhsi

Comprising ten great volumes, the book combines three authentic works on Islamic fiqh, namely the *Kubra*, the *Wusta Sughra*. This book was prepared by Shaikh Raziud Din Sarkhasi.

Al-Mabsut

Commonly known by the name of *al-Asl*, the book is the result of the painstaking efforts of Imam Muhammad bin al-Hasan al-Shibani, a source book of the Zahir-al-Rivayah.

Jame Kabir Husaidi

A good scholarly annotation on the Jami al-Kabir the book has been arranged by Jalalud Din bin Muhammad bin Ahmad al-Bukhari.

Al-Jame-us-Saghir

One from among the oldest sources of the fiqh, the book is the result of strenuous painstaking of Imam Muhammad. It discusses 1532 important topics. During early period of the Islamic government the book has been a dependable work for the judges of the Islamic courts.

Al-Nawazil

By Imam Abul Laith Samarqandi (d.376 A.H.) A wrok of high import, the book is a collection of the rulings, verdicts and the juristic opinions of the judges of the Islamic courts in the earlier ages of Islam.

Al-Sirajul-Wahhaj

By Haddad Ibadi, the work is a commentary on al Quduri. To some Ulama, the book is not so much authentic.

Al-Mukhtar

By Abdullah bin Mahmood al-Musali. This book is very much like a note book. The author himself wrote a commentary on it, all problems and questions have been solved with reference to the great Imam Abu Hanifa. This book is commonly known amongst the most circles of Ulama.

Al-Zakhirah

By Imam Burhanud Din, the author of al-Muhit-al-Kabir, a highly authentic trustable. Also known by the name of Zakhiratul fatwa.

Ghayathul Bayan

By Abul-Khair Shafic Imrani. This comprises ten volumes. There is a yet another nook bearing the same title which has been prepared by Abu Ishaq Ismad bin Tabri, a pupil of Imam Muhammad.

Al Burjundi

Being a commentary on al-Waqayah, this book was authored by Abdul-Ali al-Burjundi.

Badai-us-Sanai

By Shaikh Allaud-Din al-Kasani

Prepared on the pattern of Tuhfatul- Fuqaha of Shaikh Samarqandi, the book, comprising three volumes, is a highly acclaimed and authentic work on the Islamic fiqh's Hanafi version. The book got completed during the lifetime of Shaikh Samarqandi.

Jamiul-Muzmarat

A commentary on al-Quduri by Shaikh Jamalu Din Yusuf bin Muhammad. A copy of the book exists in the collection of the books at the Raza library of Rampur, U.P. India.

Al-Bahrur Raiq

Authored by Zainul Abidin Ibn Nujaim of Egypt the book is a very detailed commentary on the Kanzu-al-Daqaiq, a compendious digest and a celebrated text book of the Hanafi school. The book is a very authentic and highly commendable work.

Al-Yanabie

This work is a commentary on al Quduri prepared by Burhanud- Din bin Muhammad bin Abd.

Al-Niqayah

An abridged version of al *Waqayah*

Al-Zaid

One from among the various annotations of al-Ziyadah, which is a collection of the lectures of Imam Abu Yusuf, compiled and edited by Imam Muhammad bin al-Hasan al-Shibani.

Al-Inayah (in two volumes)

This great annotation of al-Hidayah is the compilation of Shaikh Akmalud-Din Muhammad bin Muhammad Babarti This book once was very popular in the countries of Asia Minor.

Al-Tahzib

This two volume work is a commentary on al-Jami-al- Saghir compiled by Mukhtar bin Hasan al-Bazdawi.

Al-Muntaqa

Compiled by Hakim Abul-Fazal Muhammad this book is not existent now. Its author claims to have studied three hundred books before embarking upon the preparation of this book.

Al-Zahiriyyah

Written by Zahir Din Abu Bakr Muhammad Bukhari, the book is of great value and highly credible. This book deals with the general problems of the day-to-day life.

Al-Ikhtiyar

The book is the result of Abul-Fazl Majdu Din Abdullah bin Muhammad al-Hanfi. Maticulous painstaking labor the aerator himself has attempted annotations of it.

Fatawa Tatar Khaniyah

Prepared during the regime of Firoz Shah in the second half of the eighth century of Hijrah by the well known faqih and jurist Maulana Farid-al-Din of Delhi, or, according to another narration, by one Alim bin Ali, the book has been compiled on the pattern of al-Hidayah. This multi-volume book is highly authentic and a source book of the Hanafi School.

Fatawa Ghayathiyah

This shorter book is very comprehensive and is considered a source book. The book was compiled by Imam Dawaoud bin Yusuf al-Khatib during the regime of Sultan Ghayathu Din Balban in the seventh century of Hijrah. It deals with the day-to-day problems.

Khulasah Fatawa Qadhi Khan

By Shaikh Abu Muhammad Zahiru Din Ahmad bin Ahmad bin Abu Thabit al-Hanafi (d.600 A.H.).

Tambatul Haqaiq

By Qiwamu Din Muhammad bin Muhammad al-Bukhari (d.749 A.H.).

Meraj-al-Dirayah

By Sadrul Islam Tahir bin Mahmood bin Ahmad Burhahudin al-Kabir Abdul Aziz al-Bukhari al-Hanafi (d.405 A.H.)

Al-Kifayah

By Ahmad bin Mahmood al-Bukhari al-Sabuni, al-Hanafi. (d.508 A.H).

Fatawa al-Bazzaziyah

By Shaikh Hafizud-Din Muhammad bin Muhammad bin Muhammad bin Shihab known as Ibn-al-Bazzaz-al-Kurdi, al-Hanafi (d.827A.H.). The book combines abridged versions of the *fatawa* from various books on al-fatawa and mentions the reasons of preference of opinions against others.

Fatawa-al-Sughra

By Shaikh Umar bin Abdul Aziz, known by the name of the Husam un-Din al-Shahid. The author's year of death is 536 A.H.

Fatawa-al-Kubra

By Ahmad bin Muhammad bin Abu Bakr-al-Hanafi. The book discusses the rare questions and problems.

Khizanatul-Fatawa

By Shaikh Imam Tahir bin Ahmad-al-Bukhari,al-Sarkahasi, that is, the author of al-Khulasa. This learned author and the distinguished man of high Islamic scholarship took his last breath in 542 A.H.

Mukhtar-al-Fatwa

By Imam Burhanud- Din Ali bin Abu Bakr-al-Marghinani, the author of al-Hidayah. Year of his death is 454 A.H.

Fatawa Sirajiyah

By Shaikh Siraj-al-Din-al-Aushi. Like Fatwa-al-Kubra this book also deals with the rare problems.

Khizanah-al-Muftiyeen

By Shaikh Imam Husain bin Muhammad-al-Sighani-al-Hanafi. The book is voluminous, mostly containing juristic details.

Al-Nahr-al-faique

By Maulana Siraju Din Umar Bin Nujaim (d. 1005 A.H). The book is a noted commentary on *Kanzu Daqaiq*.

Kanz-al-Daqaiq

By Sheikh Abul Barakat Abdullah bin Ahmad, commonly known as Hafizud-Din Nasafi (d.710 A.H) The book is a highly a cclaimed text of the Hanafi school of jurisprudence.

Al- Tanwir

By Sheikh Sharms-al-Din Muhammad bin Abdullah-al-Hanafi, who died in 1004 A.H. This compendious work combines a number of texts in addition to details.

Fatawa Nasafiyyah

By Najmud Din Umar bin Muhammad Nasafi, commonly known as Samarqandi (d.537 A.H). The book is a collection of the author's juristic opinions.

Al-Sarakhsi

By Shams-al-Ayimmah Muhammad bin Ahmad bin Abu Sahl-al-Sarakhsi. (d.483 A.H). Noteably, the author dictated this book while he was in prison completely dissociated from books and any reading material.

Beside the books named above, there are indeed many other books which were used as source material for the Fatawa Alamgiri. The long list of the source books establishes it beyond doubt that the Fatwa Alamgiri is an outcome of sustained and painstaking effort of the Ulama entrusted with the task of its compilation by the sultan.

The constituent Ulama of the Compilation Committee and the names of the ulama sharing the task of compilation of the *fatawa*

Mulla Nizamud Din Burhanpuri, Chaiman of the Compilation Committee constituted by the Sultan. By a royal decree he was authorized to institute a group of elite jurists and the men of Islamic scholarship in order to successfully carry out the task of compilation of the *fatawa*.

Born at Burhanpur, Mulla acquired his primary knowledge under the care and guidance of Qadhi Nasiral-Din of Burhanpur, who unfortunately attracted the wrath of the emperor Jahangir, and was sentenced by him with death penalty. To evade the penalty the Qadhi left India and moved to Arabia, where he stayed for five years and then returned to his home country.

Shaikh Nizamud Din entered into the service of Alamgir when he was sent to south India as the viceroy, and till the last phase of his life remained his confidant and a reliable companion. Shaikh's exceptional intelligence, inordinate academic competence and high moral integrity won him good fame and he commanded respect and veneration with the great sultan and enjoyed special privileges. After finishing the official duty it was almost customary for him daily to teach the Sultan the *Ihyaul-Ullom*, the *magnum opus* of Imam al-Ghazali. Besides his being a man of high learning and scholarship, the Shaikh was a brave soldier, handsome and healthy man. In the state of good health the sheikh took his last breath in the age of 80. His grave is at Burhanpur, his hometown.

Under his chairmanship over forty men of Islamic learning worked for a period of eight years. Unfortunately, there exists no single book giving their detailed biographical sketches. We, therefore, shall keep us confined to mention only the important names here:-

- Mulla Wajihu Din Gopa Mawi
- Mulla Hamid Jaunpuri
- Qadhi Muhammad Husain Jaunpuri
- Maulana Jala-al-Din Muhammad Jaunpuri/Machlishahri
- Maulana Nizam-al-Din Tatwi
- Mulla Muhammad Jamil Siddiqi Jaunpuri
- Maulana Muhammad Shafi Sirhindi/Bihari
- Qadhi Muhammad Abul-Khair Thatwi/Sindhi
- Mulla Abu Waiz Hargami Badayuni
- Mulla Wajihur Rabb
- Mulla Ziaud-Din Muhaddis
- Sayyid Muhammad Qannauji
- Shaikh Raziu-Din Bhagalpuri
- Mulla Muhammad Akram Lahori
- Maulana Sayyid Muhammad Faiq
- Qadhi Ali Akbar Sa’adullah Khan
- Sayyid Inayatullah Mungeri
- Mulla Ghulam Ahmad Lahori
- Mulla Fasihu-Din Ja’fari, Phulwari
- Shaikh Ahmad-al-Khatib
- Shaikh Muhammad Ghaus Kakorwi
- Amir Miran Allama Abul Farh
- Mulla Abul Hasan Darbhangawi
- Shaikh Abdul Fattah Jaunpuri
- Qadhi Azmatullah Lucknowi
- Mufti Abul-Barakat Dehlawi
- Qadhi Abdus Samad Jaunpuri
- Qadhi Muhammad Daulat Fatah Puri
- Maulana Muhammad Saed Sahalwi
- Shah Abdur Rahim Dehlawi; and
- Mulla Hyder Qadhi Khan Kashmiri.

Translations of the Fatawa Alamgiri

Keeping in view the inordinate importance of the fatawa, and also to widen the circle of its prospective beneficiaries, the sultan wished to see the Fatawa Alamgiri in Persian, the official Language during those days. For the purpose he hired the services of Shaikh Abdullah Khalafi Romi, a great scholar and *sufi*, with a very good skill in the Arabic, Persian, Trukish languages. He embarked upon this task with a number of his students. Whether the task of translation was completed or not is not known, and we have no traces of it. Only a portion of the fatawa was rendered into persian by Qadhi Muhammad Najmud Dinkhan at the behest of the Fort William College which subsequently was published in 1813 from Kolkata and later from Kanpur under the title 'Kitabul Hudood'. This too is not available now; only an incomplete hand-written copy exists in the Khuda Bakhsh library collection.

Alamgiri's English Translation

Alamgiris complete English translation has never been attempted; only some fragments were rendered by N.B.E. Baillie which bear the title, 'A Digest of Muhammadan Law in Islamic India'.

Its Urdu translation

After the tragic fall of the Islamic India when the Arabic and Persian languages became foreign to Muslims in British India, they felt the need for the Alamgiri's Urdu translation. Justice Sayyid Amir Ali, a noted man of law, carried out this onerous task. This translation got published from Nawal Kishor press Lucknow in 1872 in ten volumes.

The Majallah

The Ottoman state also decided to prepare a civil code. A seven-men committee of jurists, called the Committee of the Majallah, was constituted under the chairmanship of Ahmad Khulusi and Ahmad Hilmi, the members of the Bureau of Legislation; Muhammad Amin al-Jundi and Sayf al-Din, the members of the State Consultative Council; Sayyid Khalil, Inspector of Waqfs (religious foundations); and Shaykh Muhammad 'Ala' al-Din ibn 'Abidin (of Damascus).[277] However, the composition of this committee changed in the course of its existence by additions and replacements.

The aim of the committee was "to prepare a book on juridical transactions which would be correct, easy to understand, free from contradictions, embodying the selected opinions of the jurists and easily readable by everyone".

The reason for this codifying, as the committee explained in its report submitted to the Prime Minister Ali Pasha in Muharram 1286 A.H. (1869 A.D.), was that "the science of jurisprudence is an infinite sea with no shore to it. The deduction of the most worthy opinions for the solutions of judicial problems requires considerable intellectual skill and thorough grasp (of the subject), particularly so in the Hanafi school where many interpreters of varying caliber have given conflicting opinions. Despite this fact no attempt has been made, as in the shafi School, to sift and crystallize the subject matter. It is very difficult to discover the correct rules and to apply them to specific cases. Moreover, the changing times give rise to problems that must be built upon custom or usage".

The committee began its work in 1285 A.H. (1865 A.D.). It submitted the introduction and the first book of the Majallah to shaykh al-Islam and other dignitaries who incorporated certain modifications and refinements. The members of the committee then divided the work amongst themselves, so that each member participated in writing some sections. The chairman alone participated in all its sections. The compilation was completed in 1293 A.H. (1876 A.D).

---

[277] Shaykh Muhammad 'Ala al-Din ibn Abidin is the author of *Qurrat 'Uyun al-Akhyar*, (the continuation in 2 vols. of Radd al-Muhtar). He is the son of Muhammad Amin ibn Abidin (d.1252 A.H./1836 A.D.), the writer of al-'Uqud al-Durriyah and Radd al-Muhtar (known as ibn 'Abidin's Hashiyah).

Thus the Ottoman Civil Code came into existence. It was enacted by an iradah, a royal decree, by the sultan under the title: Majallat al-Ahkam al-Adliyah (the cropus of Juridical Rules).[278]

The Contents of the Majallah

The Majallah comprises 1,851 articles arranged in an introduction and sixteen books. The introduction consists of 100 articles. The first defines the science of jurisprudence and its divisions, and the remaining articles deal with maxims or generally applicable rules.

The books of the Majallah are as follows: the book of sale, the book of hire, the book of guarantee or suretyship, the book on transfer of debt, the book on pledges and mortgages, the book on deposit and trusts, the book of gift, the book of wrongful appropriation and destruction, the book of interdiction, constraint and pre-emption, the book of joint ownership or partnership, the book of agency, the book of settlement and release, the book of admission, the book of actions, the book of evidence and administration of oath, and finally, the book of administration of justice by the courts.

The Majallah was mainly derived from the books of Zahir al-Riwayah in the Hanafi school. In case of conflict between the views of the Great Imam (Abu Hanifah) and his companions, the Majallah adopted those opinions which conform to the needs of the ages and public interest. For example, in the interdiction of a prodigal the Majallah adopted the views of the two imams, Abu Yusuf and Muhammad ibn al-Hasan al-Shaybani, discarding the opinion of the Great Imam Abu Hanifah. Also in contracts of *istisna'* (manufacturing a thing for future delivery) the Majallah adopted the views of Abu Yusuf.

In a few other cases the Majallah abandoned the views of Zahir al-Riwayah and had recourse to other works. For example, the Majallah agreed with the views of the Later jurists in the Hanafi school concerning the liability for benefits accruing from property wrongfully appropriated. This views is similar to that of the Shafi'i school.

Contrary to al-Fatawa al-Alamgiriyah and other compilations of Islamic jurisprudence, the Majallah did not go into questions of religious observances or penal matters; its scope was restricted to the rules of law in civil transactions.

---

[278] The word "*al-majallah*" in Arabic means "a page which contains wisdom"; also, "any written book", See Ibn Manzur, Lisan, XIII, 127.

A comparative analysis of the Majallah with modern European codes of law reveals in the former a number of shortcomings which call for certain observations. The most serious defects are the following:

First, the Majallah did not deal with questions of personal status, deanship, etc., except indirectly in the ninth book on interdiction. It also left out the laws of inheritance, wills, waqfs, and other such-like mattes as may be found in modern civil codes. The reason for these gaps is attributable to several factors, one of which is the considerable divergence in the interpretation of these questions by jurists. Another factor was the existence of several ethnic groups and religious denominations in the Ottoman Empire, and the policy of toleration which the Ottomans pursued in those days with the non-Muslim elements, giving them a free hand in denominational matters and problems of personal status.

The situation remained as described until 1917 when the Ottoman state enacted a law for marriages and their dissolution entitled the Law of Family Rights (issued on Muharram 8, 1336 A.H.). This law, though in the main based upon the state's official school, the Hanafi, had recourse in many matters to other Islamic schools such as in questions of violability of forced marriages, the vividness of forced divorce or divorce by one who is drunk, judicial divorce between husband and wife in case of serious depute, and other similar issues.

Second, there is no general theory in the Majallah governing obligations and contracts. We see, for example, principles of *offer* and *acceptance* which cover all types of contracts embodied in the Book of Sale. Similarly, we find most rules relating to civil torts dispersed in provisions dealing with wrongful appropriation and destructions.

Third, the Majallah adopted the theory of the voidable (*fasid*) contract and made the validity of certain contracts conditional upon stipulations which limit the freedom of contracts. It did not make use of provisions in other schools of Islamic jurisprudence which liberalize conditions of contraction. For example, a provision in the Majallah says, "If a bargain is concluded with stipulation for payment at an indefinite time such as 'when the sky rains' the sale is voidable". Moreover, the Majallah, unlike the Shafi's school, did not consider beneficial use as a valuable thing, with the result that a person wrongfully appropriating the property of another is not obligated to pay for the use thereof except in certain circumstances (Article 596).

This defect, however, was removed by Article 64 of the Ottoman Civil Procedure Code as amended in 1914 A.D. This article laid down the principle of the freedom of contract in Ottoman law. It permitted all contracts and agreements which do not violate regulation, morals or public order. It made it sufficient for the validity of a contract that agreement is reached between the two parties to a contract on the main provisions, even though no mention was made of the minor terms. The article also permitted contracts whose subject matter was goods of future existence and recognized as property all specific objects, benefits, and rights which customarily have been accepted in circulation.

Commentaries on the Majallah

The Majallah at the time of its publication filled a considerable gap in the field of the judiciary and of legal transactions. In place of the multifarious and widely dispersed opinions in the books on jurisprudence and fatwas, the Majallah presented a firm and clear exposition of shariah laws which jurists could, without great exertion, comprehend and apply. Annotations formerly based on the many books on jurisprudence became restricted to the articles of the Majallah, expounding their meaning and indication their sources.

The old commentaries and annotations of the Majallah in Trukish included those of Atif Bey, Rashid Pasha, and Jawdat Pasa. Of the oldest commentaries in Arabic was Mirati Majallai Ahkami Adliyah (The Mirror of the Majallah of Juridical Rules) by Masud Effendi, former Mufti of Qaysari, and printed in Istanbul in 1299 A.H. (1881 A.D.). It is an Arabic commentary on the Turkish text containing as sound exposition of the sources with clear and concise explanatory notes.

This was followed by the commentary of Salim Rustum Baz, a Lebanese and a member of the Ottoman state Consultative Council. His first edition appeared in 1888 and was followed by many editions thereafter.[279] It is an impressive volume, easy to understand, concise in its expressions, and substantiated by the citation of references from which the author obtained his material. It was highly rated by the jurists in the Arab countries and became one of the most popular references; however, the book was intended for the rules in the Majallah.

Another annotation appeared in two volumes by Yusuf Asaf, entitled Mirat al-Majallah (Mirror of the Majallah).[280]

However, the largest and the most authoritative annotation of the Majallah was carried out by Ali Haydar, former President of the Ottoman Court of Cassation, Chief of Fatwas, Minister of Justice and Professor of the Majallah at the Istanbul Law Faculty. It is called Durar al-Hukkam Sharh Majallat al-Ahkam. It falls into sixteen volumes, some large, others small, according to the arrangement of the Majallah. It is more comprehensive that the annotation by Baz as it incorporates the Shari sources for every rule with a citation for that source. This most adequate commentary testifies to the author's masterly knowledge of his subject, and later annotations of the Majallah made use of it; advocate Fahmi al-Husayni translated it from Turkish into Arabic.[281]

---

[279] 3rd edition, Beirut, 1923.

[280] Printed in Cairo,1894.

The first modern commentary on the Majallah appeared in 1919 by Muhammad Said Murad al-Ghazzi, a professor at the Damascus Faculty of Law. It is called Kitab al-Adillah al-Usuliyah Sharh Majallat al-Ahkam al-Adliyah fi Qism al-Huquq al-Madaniyah and is a concise commentary in three small volumes. The section on maxims contains useful comparative analysis.[282]

In 1927 yet another commentary appeared by Muhammad Said al-Mahasini, also a professor of Majallah at Damascus. The book, intended for the students of law, comprised three volumes following the arrangement of Ali Haydar's work, without the references, but with an addition of notes on the comparison with modern codes.[283]

Other recent annotations included one by the late Muhammad Khalid al-Atasi, a former Mufti of Homs. The book was completed and published by his son Muhammad Tahir al-Atasi, the former Mufti of Homs. It is an impressive work in six volumes[284], and comprises the most reliable sources of Islamic jurisprudence.

There are other commentaries on the Majallah, most of which are devoted to the first 100 articles, but no useful purpose would be served by discussing them here.

---

[281] The varios volumes were printed separately in Haifa, Jaffa, Gaza and Cairo, between 1925 and 1936. The Turkish original was printed in Istanbul in 1330 A.H. in four volumes.

[282] Printed at the Patriarchate Printing Press, Beirut (?) 1338 A. H.

[283] Al-Mahasini has anoter work on the Majallah entitled, *Mujaz fi al-Qanun al-Madani*.

[284] Printed in Homs (Syria) between 1930 and 1937.

CHAPTER 12

THE LEGISLATIVE MOVEMENTS IN EASTERN COUNTRIES

The Majallah in the Modern era

The movement for the codification of legislation has been general in the Arab countries. The Majallah was in force in Turkey and in most territories formerly under the Ottoman regime until after World War, I; in the aftermath of World War I, Turkey abrogated it entirely, while in the Lebanon and Syria, except for a few of its provisions, it was repealed in stages. At the present time it is in force only in the Hashemite Kingdom of Jordan,[285] but with many modifications and amendments.

We shall now give a brief survey of the legislative and codification movement in the major Islamic and Arab countries.

Pakistan and India

According to a census, taken in 1941, there were approximately 95 million Muslims out of a total population of about 400 million in India. Before the recent partition the majority of them lived in the provinces of Bengal, Punjab and Kashmir. The predominant school among them is the Hanafi, with the salafi (puritan) school (see the following section) ranking second, then the Shi'ah school, and lastly, the Shafi'I school.

From the outset the policy of the British administration was to let the people of India conduct their lives according to their own customs and laws. In pursuance of this objective, the British authorities enacted, in 1772, a law which provided that the shariah should be applicable to all cases relating to inheritance, marriage and other sectarian problems peculiar to the Muslims.

---

[285] In the Hashemite Kingdom of Jordan, for example, the Majallah is still applied in principle, together with Article 64 of the law of Civil Procedure, as well as other amendments, a such as the Evidence Amendment Law of 1928 which gave the judge the right to examine testimonies and evaluate them, (published in the official Gazette No. 211, 6 December 1928.)

It was natural, therefore, that those administering justice in cases involving Muslims had to have recourse to the Islamic shariah and to Arabic books on jurisprudence. Al-Hidayah was easily the most popular reference for the Hanafi school. Also well-known were the collections of Indian *fatwas*, al-*Alamgiriyah*, and al-Sirajiyah.[286] Sharai al-Islam was the major reference book in the jafari School of jurisprudence (Shiah School).

Some of these books were translated into English. For example, Hamilton translated al-Hidayah in 1791;[287] Sir William Jones translated al-Sirajiyah in 1792; Baillie translated a number of sections from the Indian fatawas and also the larger part of Shari'a al-Islam (Baillie, Digest of Muhammadan Law).

The situation in India remained such until the middle of the 19th century when the Government launched its legislative movement. Numerous laws were enacted including the law of 1843 abolishing slavery; the Criminal Code, and the Code of Criminal Procedure, both of which became effective in 1862; the Indian Evidence Act (1872); the Law of Waqfs (1913)[288] and the Shariah Act for Muslims (1937).[289]

This, in general, was the legislative situation in India prior to the partition. Except for the legal amendments enacted by the state, the Islamic Shariah was still applicable to Muslims either by explicit provision of the law as in matters of personal status, or in accordance with customs and usages as in the rules concerning pre-emption. However, the judges, in applying the rules of the shariah did not always stay within the confines of the doctrines and *fatwas* of the jurists, but broadened their interpretation on occasions due to the influence of their English legal training and the changing needs of modern society.[290]

Egypt

Egypt is a Muslim country with an overwhealming majority of Muslim population. The predominant school there is the Shafi. It was quite natural because Imam al-Shafie propagated his new school in Egypt; the Shafi was also the school of the Egyptain judicial system until the time of the Ismailiyah state (Fatimids). Later, when the Ayyubid dynasty succeeded the Fatimids, the Shafi'I school was reinstated as the official school and so remained until the time of the Mamluk-e-Sultan al-Zahir Baybars, who sanctioned the four schools: the Shafi'I, the Maliki, the Hanafi and the Hanbali while retaining the Shafi judge precedence over others. This situation continued until the Ottoman conquest when the Hanafi School was installed and remained in a position of pre-eminence in Egyptian shariah law until the present day.

---

[286] Written by Siraj Muhmmad al-Sajawandi, a Muslim jurist of the 6th century A.H. This book is known for treating the law of inheritance (*mawarith*)

[287] Published in London in 4 volumes and printed several times in 1870.

[288] Wilson, Digest, 4 and 21-48.

[289] Mulla, Principles, 3ff.

[290] Abdur Rahim, Muhammadan Jurisprudence, 42-44.

During the Ottoman regime civil courts were established and the jurisdiction of the shariah courts was restricted. However, the Majallah was not enforced for political reasons. Egypt achieved judicial and administrative independence from Turkey in the reign of Ismail Pasha by virtue of the Khedivial *firman* (decree) issued in 1874 A.D.

This was followed by the creation of Mixed Courts to consider cases in which foreigners were a party to a dispute. The Mixed Civil code was National Civil Code was enacted. A number of statutes followed regulating Shariah Court and restricting their jurisdiction to questions of personal status and the like.[291]

In addition to this, the Egyptian Government entrusted the late Muhammad Qadri Pasha with the compilation of Shariah rules relating to personal status on the basis of the Hanafi school. He compiled a code embodying 647 articles which covers marriage, divorce, parenthood, guardianship, interdiction, gifts, wills and inheritance. This work became the major reference of the Egyptian Shariah Courts and for other Islamic countries as well.

The adoption in principle by Egypt of the predominant opinions in the Hanafi school received official endorsement in Article 280 of the Shariah Courts Organization Regulation of 1910 A.D. However, Law No. 25, issued in 1920, modified the 1910 regulation and stipulated that the Maliki and Shafi schools be adopted in certain questions such as alimony, *iddah* (period of retirement for a woman before re-marriage) and *mafqud* (person lost and presumed dead). Mention must also be made of the Eyptian Law of Inheritance of August 6, 1943.[292]

Egypt was also the birthplace of a new reform movement, the Salafiyah or the puritan movement, which was initiated by Sayyid Jamal al-Din al-Afghani

---

[291] Goadby, Introduction, 162 ff.; and Arnus, Tarikh, 103-111 and 196 ff.

[292] No. 77, published in the official Gazette, No. 92, 12 August 1943, to be effective six months after publication. It is composed of 48 articles.

(1839-1897) and was carried on after his death by his pupil, Imam Shaykh Muhammad 'Abduh (1849-1905),[293] Mufti of Egypt. The principles and beliefs of this movement were published in books, lectures and aricles appearing manly in "Al-Manar" magazine, founded by Sayyid Muhammad Rashid Rida in Cairo in 1897.

The Salafiyah school advocates a return to the Qura'n and the sunnah while combating rigidity, superstition and novelties incompatible with the actual teachings of religion. It also opposed blind imitation because "imitators in every nation who copy the characteristics of other nations constitute breaches in the line through which enemies can infiltrate. Their minds become repositories for suspicions and conspiracies; their hearts overwhelmed by the glorification of those whom they imitate and by disdain for those who are not likewise. They are a curse to their countrymen whom they despise and who's every deed they belittle".[294]

Thus it is clear that the Salafiyah School is akin to the Wahhabi of the Neo-Hanbali school,[295] because both advocate return to the origins of the Shari'ah based upon the Qur'an and the genuine sunah. More over, they advocate the deducation of rules from these original sources and emancipation from the static views of imitator-jurists.

The Salafis (followers of Salafiyah) stood for the unification of the various Islamic schools. They argued: "The Islamic nation cannot suffer the burden of following the imitators of one school or of subjecting its marital, domestic and financial interests to their comprehension of the books of any particular school with its liberal as well as its rigid rulings".[296] They believe that the shariah fully compatible with modern civilization, and issue many fatwas legitimatizing transaction necessitated by the requirements of modern commerce. Their motto is that "in the event of a conflict between reason and authority (precedents), reason should be given the upper hand". This is in line with the statement by Ibn Taymiyah that, "substantiated narratives in the shariah are always in conformity with the dicates of reason".[297]

---

[293] Rida, Tarikh.

[294] Al-Urwah al-Wuthqa, (Beirut, 1933), p. 66. This was a weekly review published by al-Afghani and Abduh in Paris in 1883. Only 18 numbers were published during eight months.

[295] Al-Manar, (1345 A.H.), 3.

[296] Ibid., 158.

The late rector of al-Azhar University, Shaykh Muhamad Mustafa al-Maraghi (d.1945) followed up this reform movement which beneficially influenced the fields of legislation, teaching, and publication. He delegated a group of ulama to represent him at the International Conference on Comparative Law, held in The Hague in August 1937. The delegation expounded to the conferees criminal and civil obligations in the shariah. They further asserted that shariah was a self-sufficient system independent of Roman jurisprudence and amenable to modern development. The conference agreed that it was in fact amenable to development and growth by itself and of its own volition, in accordance with the needs of modern times. The conference also proposed that the Arabic language be used in future conferences along with other languages in the study of questions pertaining to shariah.

A committee was also formed, under the chairmanship of the late Shaykh al-Maraghi, with a membership which included Shaykh 'Abd al-Majid Salim, Mufti of Egypt, and Shaykh Fathallah Sulayman, chief of the Shariah Judges. The task of the committee was to effect a reform to the system governing personal status and the codification of its rules on modern lines. In doing so it was to depend upon all the Islamic schools and not to restrict itself to the interpretations of any particular school.[298]

Finally, it is necessary to refer to the national legislation movement which arose as a reaction to the adoption of European laws and the discarding of the Islamic shariah as a basis for modern Egyptian law-making in all its aspects. When the Khedive Ismail Pasha rejected the Ottoman Majallah in a bid for emancipation from the Turks, he entrusted Shaykh Makhluf al-Minyawi with the task of coordinating French law with the Maliki school. In spite of the huge volume which this learned jurist had prepared and his plea that both the French and the Maliki codes were harmonious in many respects, the enactment of the Egyptian Civil Code derived from the Code of Napoleon caused uproar in most of the Shariah-abiding Muslims. An attempt was made to prove that there was no need for it; as a part of this campaign the late Qadri Pasha compiled a book entitled Murshid al-Hayram ila Marifat Ahwal al-Insan (the Guide of the

---

[297] Abduh, Islam, 56.

[298] Subkhi et al., Tarikh, 351 ff. See the opening speech of al-Maraghi with which he addressed the committee, in Musharrafah, Qada, 78-80; and Bulletin trimestriel de la societe de legislation compare (1937), 356-57.

Perplexed to the Understanding of the Problems of Man). This took the form of a modern civil code derived form the Hanafi School.[299]

Lately when the Egyptian Government formed committees to reconsider and revise the legal system of the land, the nationalist movement staged a comeback. A group of Ulama[300] advocated the adoption of Islamic shariah as the basis of legislation, protesting that the existing system had turned alien to the country and proposed a return to Islamic shariah which had been the law of the land for thirteen centuries. The shariah, they contended, would preserve national pride, the Arabic language, religion, and traditions. They further claimed that the shariah was so rich in legal treasures as to be more than sample for all aspects of modern civilization and national awakening. Such an orientation would not only mean emancipation from the foreigner and an endorsement of Egypt's position as a leader in the East, but would also insure harmony between the machinery of government and the governed, the existence of which is a pre-requisite for the success of all legislation.

Three committees were formed for the purpose of revising the Egyptian Civil Code: the first in 1936, the second in 1938, and the third later that same year under the chairmanship of Dr. Abd al Razzaq al- Sanhuri Pasha. Two years later the last committee completed its task and followed it up with a number of valuable explanatory memoranda.

The new code consists of 1149 articles and is derived from three sources: comparative law, Egyptian Case-law, and the Islamic Shariah. It was from the latter source that the new code derived the theory of the misuse of rights *(abus des droids)*, capacity, the transfer of debt, acts of God, death-sickness (rules governing a person's right to dispose of his his death-bed), deceit, limitation by time, pre-emption, gift and other detailed rules. The first article in the code provided that a judge should have recourse to the principles of the Islamic shariah in the absence of a legislative provision in any particular case.[301] This code was published in July 16, 1948, and was put into force on October 15, 1949; the date at which the mixed Courts were abolished in Egypt. property on

---

[299] In 1045 articles.

[300] Chiefly Shaykh Muhammad Sulayman, *(Risalah bi-Ayy Shar Nahkum)*; Shaykh Ahmad Muhammad Shakir, (al-Shar wa al-Lughah); Muhibb al-Din al-Khatib; and others.

[301] See Dr. Sanhuri's speech on this code delivered at the Royal Egyptian Geographical Society, 24 April 1942, in Majallat al-Qanun wa al-Iqtisad, XII, 551-570.

Turkey

We have already explained the steps taken by the Ottoman Empire in the codification of its law on the basis of Western legislation, including the compilation of the Majallah. We shall now discuss, in brief, the modifications that have since been introduced in the Turkish legal system.

The Turkish regeneration movement began in 1908 with the revolt of the Young Turks against the political rule of Abd al-Hamid. It is the revolt which culminated in the well-known constitutional reforms. It was natural that the temperament of the Turkish people would yearn, from that date on, for the new and for the abandonment of the inheriteal traditions. There were many who boldly demanded reforms. Muhammad ʻUbaydallah Effendi, there were many proposed the translation of the Qura'n into Turkish in deference to the Turks' national consciousness.

With the victory of the Nationalist Kamalist Movement under the leadership of Mustafa Ataturk, the reform movement took on a new secular trend with the avowed purpose of destroying the Islamic caliphate and combating all non-Turkish influences. Upon the conclusion of the Treaty of Lausanne in 1923 the Turks proclaimed their republic on the 29th of October 1923. While maintaining the Caliph ʻAbd al-Majid Effendi in his post.

In the early part of the following year the caliphate was abolished: all members of the Uthman dynasty were expelled from Turkey; the post of the Shaykh al-Islam was abolished and so were the Shariah Courts. In 1925 the reactionary movements such as the Mawlawi and the Baktashi (Sufi orders) were disbanded; the wearing of the hat (replacing the traditional fez) became compulsory. This was followed by the translation of the Qura'n into Turkish and the replacement of Arabic characters by Latin characters. Efforts were made to remove Arabic and other foreign words from the Turkish languages.

In the field of legislation, revolutionary changes were carried out with great expedition. The Truks, as Mahmud As'ad Bey, the then minister of justice explained,[302] were bent on saving time and effort by selecting one of the modern European codes, translating it into Turkish and having it enacted by the National Assembly as did Napoleon with his code without a long process of parliamentary debate. They, thus, hoped to gain a ready code of law with its annotations, interpretations and precedents. In 1926 Turkey adopted the Swiss

---

[302] In his statement to Count Ostrorog, the Angora Reform, 86-87.

Code of Obligations and the Swiss Civil Code without any amendment worthy of note.[303]

In other words, the Turkish Civil Code is the Swiss Code with minor changes. For example, a person becomes of ages in Turkey at 18 (Article 11) but not until 20 according to the Swiss Code (Article 14).

Thus Turkey abrogated the Majallah and all shariah laws; equality of the sexes in questions of inheritance and in the right to demand divorce for specific reasons was recognized. Polygamy was outlawed, and marriage between couples of different religious affiliations became permissible.

Despite all these steps, the Tuks still regarded Islam as the religion of the state but they separated religion from the sphere of law. The area of the former was confined to questions of faith, while the latter became secularized, drawing its authority from the state and entirely severed from religion and *shariah* jurists.

The Lebanese Republic

The Lebanon in ages of past was a name given to a mountain in Bilad al-Sham (Syria). During the Ottoman regime and by virtue of the Protocol of 1864, the Lebanon enjoyed autonomy. It has been one of the Arab lands which gave birth to many prominent men of learning who served the Arabic language and its literature with great distinction and devotion.

At the end of World War I the Lebanon was placed under French mandate. Its independence was declared in 1920 under the name "The Greater Lebanon" after incorporating into it parts of the (Syrian) coast and the interior; the Lebanese Republic was proclaimed in 1926 with a Lebanese president under the French mandate.

Finally, the mandate was abolished and the Constitution was amended on the 9th of November 1943, after a bloody rebellion. The 'Great Powers' recognized the unconditional independence and sovereignty of the Lebanon. A national government assumed all the functions of a sovereign state including diplomatic representation with foreign states.

The Lebanon took part in the San Francisco Conference and signed the United Nations Charter,[304] the eighth and 78th articles of which make Lebanon a member of the world organization and free it from any limitation affecting its sovereignty or independence.

---

[303] Translated into Arabic by Khalid al-Shabandar, Baghdad.

[304] Approved by the Lebanese Chamber of Deputies on 4 September 1945. The Law is dated 25 September 1945.

In the field of legislation the Lebanon had, in the premamdatory era, been subject to Ottoman laws including the Majallah. The Mandatory Power, however, enacted numerous legislative measures, acting sometimes on its own, and a to other times in cooperation with the local governments. These French enactments included: the Code of Property; the Code of Obligation and Contracts, the Code of Civil Procedure, Commercial Code, Penal Code, and the Law Reorganizing the Shariah Courts.

The Code of Property was enacted by the French High Commissariat in Ordinance number 3339, dated November 12 1930 (Published in the Official Grzette on January 31, 1931). It comprises 270 articles and deals with real estate, various rights *in rem*, such as ownership, life insurance, easements, mortgage and the acquisition, transfer and lapse of such rights. This code together with previous enactments which established the Land Register and with later amendments,[305] constitutes today the law of property in the Levant state formerly under the French Mandate, i.e., Syria and Lebanon. Thus all former rules which did not conform to the new code were abrogated. For example, the provisions in the Majallah concerning rights of preemption, neighboring of contiguous property, and other rights *in rem*, were repealed.

In 1925 the Government entrusted M. Ropers, a French judge, with the preparation of a code covering contracts and obligations. His work was submitted to M. Louis Jusserand, a distinguished French jurist, Dean of the faculty of law at the University of Lyons, a former member of the French Court of Cassation, and a distinguished author in the field of French jurisprudence.[306] This jurist introduced fundamental changes and re-wrote the text in a final draft. This draft was in turn submitted to the Lebanese Consultative committee on Legislation which made deletions and additions. Finally the draft was enacted by the Lebanese Chamber of Deputies. The code was published on April 11, 1932, and was put into force thirty months later on the 11th of October 1934.

The Code of Obligations and contracts consists of I, 107 articles and is divided into two parts. The first deals with obligations in general, their types, sources, effects, transfer, and extinction. the second embraces specific contracts such as sale, barter, gift, hire, deposit, loan, agency, companies (including joint ownership of property), contracts of risk (insurance, gambling, betting, income for life), sett clement and suretyship.

---

[305] Decisions Nos. 186-189 issued on 15 March 1926, and their amendments.

[306] Among his important works are: *Cours de droit civil positif francais*; De pesprit des droits et de leur relativitel and theorie dite pabus des droits.

An annex to the code was issued in a decree number 461, dated October 20, 1932, in connection with the pawn of movables and rights. A number of articles were also revised by later laws including: Decree number 51L issued on November 5, 1932, which modified Article 131 relating to the custodian of sequestrated or frozen properties and a decree issued on November 5, 1932, which modified Articles 652 and 656 concerning compensation for dismissal from service in a labor contract.

The Code of Obligations and Contracts in Article 1106 specifically repealed all the rules of the Majallah and other legal provisions which did not conform to the text of the law. Thus only a few of the Majallah rules remained operative. These included: interdiction of minors, lunatics, imbeciles and prodigals, in Articles 941 *et. seq.*, but with modifications incorporated in Articles 215-2018 of the Code of Obligations; sharecroppers agreements (partnership in land and work), partnership in trees and work;[307] the rules concerning the transaction of persons in death-sickness, particularly since for the Muslims such transactions are tantamount to all will; and other Majallah rules relating to hunting, unoccupied land and common lands.

Concurrently with the implementation of the Code of Obligations and Contracts the new Lebanese Civil Procedure Code was put into force by virtue of Decree number 72, dated February I, 1933. This code was drafted by M. Proud, a professor of law at the University of Lyons and was revised by the Lebanese Legislative Committee.

The new Civil Procedure Code repealed all former laws in conflict with it, such as the Magistrate's Law, the Ottoman Civil Procedure Code and its supplement, and the law of Execution.[308] Several amendments have been introduced to the new code concerning the reorganization of the judiciary, the principles of jurisdiction and competence, and imprisonment of a debtor.

The Government also asked two professors of Commercial Law at the University of Lyons to prepare a Lebanese commercial code. This they did and the draft law was submitted to the legislative consultative Committee[309] for scrutiny and was published in the Official Gazette on April 7, 1943; [310] and came into effect six months later. The new code introduced certain matters hitherto non-existent such as rules governing corporation laws, a trade registry, provisional bankruptcy settlement, and similar matters. The code also denied a married woman the capacity to engage in trade without the explicit or implied permission of her husband (Article 11). Contrary to the general laws of the land, other articles in the law were also amended, particularly those relating to corporations (September 30, 1944 and November 23, 1948).

---

[307] The Majallah, Aricles 1431-1448. See also Article 623 of the Code of Obligations and Sharecroppers Agreements, No. 12 L.r., issued on 16 January 1934.

[308] Except in executions relating to immovable property not subject to the Code of Registration of Immovable Property, (Article 856 of the law).

The Lebanese Government also decided to introduce a new Penal Code and this task was entrusted to a committee of leading judges of the Court of Appeals.[311] The committee drafted a code which the government approved in a legislative decree[312] published in the Official Gazette on October 27, 1943. It became operative on October I, 1944. The new code testified to the Maturity of Lebanese jurists and illustrated the readiness of the country for independence in this, as well as in other spheres of public life. The Syrian Penal Code was adopted from this. This Penal Code, However, unlike other Lebanese Law, was not submitted to a legislative committee for scrutiny. It was natural, therefore, to find in it minor defects, as regards certain substantive matters as well as linguistic terms.

On the whole, the new Lebanese laws are derived form the best European laws and judicial precedents. They are saturated with the most advanced leagal theories prevalent in France, Germany, Switzerland, and other countries.

It is necessary, finally, to mention the new Shariah Courts Reorganization law issued in Decree number 241, dated November 4, 1942. This law reorganized the Muslim Shariah Courts for the Sunni as well as the Jafari (Shiah) sect in regard to questions of personal status. The Court of Appeal consisting of Shariah judges with a civil judge to act as attorney general. The Ottoman law of Family Rights and the selected opinons of the Hanafi School were to be applicable in Sunni courts, while the precepts of the Jafari school and those provisions of the Ottoman Law of Family Rights, which conform to it, were to govern cases at the Ja'fari Courts (Article III).

---

[309] Formed in accordance with decree No. 6019, of 18 December 1929.

[310] In accordance with legislative decree No. 304 of 24 December 1942.

[311] composed of Fuad Ammun, Wafiq al-Qassar, and Philip Bulus, in accordance with the decision of the Prime Minister and Minister of Justice, No. 931, 22 February 1939.

[312] No. 340, I March 1943.

SECTION-TWO

CHAPTER 13

DISPELLING DOUBTS AND REMOVING MISAPPREHENSIONS ABOUT THE LAW OF ISLAM

Rights of the Dhimmis

Treatment of Christians and Persians as Aliens

It would be absurd to try to compare the rights granted by ‘Umar to Dhimmis (non-Muslim subjects of the Muslim state) with those granted by other imperial states of the day to their subjects of alien races. Umar’s neighbours were the Eastern Rumi Empire and the Persian Empire, and in both of them the status of alien subjects were worse than that of slaves. The Syrian Christians, though coreligionists of their Rumi rulers, had no proprietary rights in the lands they tilled. On the contrary, they were themselves treated as a kind of property, for when an estate was sold by one owner to another, the cultivators were conveyed along with their land, and the new owner had the same rights over them as the earlier one. The condition of the Jews was worse still, and was indeed so bad that they could hardly be called subjects, for the subjects of a state to have some rights after all, whereas the Jews and none-Christians were in the same plight in Persia.

When ‘Umar conquered these lands, the status of the subject peoples underwent an immediate change, and the rights granted to them were so liberal as if the subjects were not mere subjects but equal parties to a treaty. Below we reproduce the treaties entered into with the conquered peoples. They not only bear out the statement made above, but will also enable the reader to compare the rights granted by ‘Umar with those granted by Europen imperialists to their subjects in any country in spite of their pretensions to being civilized states.

It should be noted here that some of the treaties preserved in the books of history are in detail, while others are brief: for to repeat the same conditions again and again in detail would have been needless pedantry. So in the case of the majority of treaties they content themselves with referring to some one treaty for the terms, as the terms of the various treaties where usually the same. The tready of Jerusalem written in the presence of and dictated by 'Umar himself was as follows:

> "This is the protection which the servant of Allah, 'Umar, the Commander of Believers, has granted to the people of Ailiya. The protection is for their lives and properties, their churches and crosses, their sick and healthy and for all their co-religionists. Their churches shall not be used for habitation, not shall they be demolished, nor shall any injury be done to them or to their compounds, or to their crosses; nor shall their properties be harmed in any way. There shall be no compulsion on them in the matter religion, nor shall any of them suffer any harm on account of religion. Jews shall not be made to live with them in Ailiya. The people of Ailiya undertake to pay Jiziyah like the inhabitants of other cities and to turn out the Rumis. The life and property of the Rumis who leaves the city shall be safe until he reaches a place of safety, but who makes his domicile in Ailiya shall be safe and shall pay Jiziyah. If any of the inhabitants of Ailiya wish to go away with the Rumis and take their properties away with them, they and their churches and Crosses shall be safe until they reach their place of safety. Whatever is written herein is under the covenant of Allah and the guarantee of His Apostle, of the Caliphs and of the Believers, as long as they pay Jiziyah imposed on them. Witnesses to this deed are Khalid b. Walid and 'Amr b. al-'As and 'Abdul-Rahman b. 'Auf and Mu'awiyah b. Abi Sufyan. Written in 15 A.H."[313]

The *farman* makes it clear that the lives, properties and religion of the Christian subjects shall be safe from every kind of interference or molestation, and it is obvious that the rights granted to any people falling in these categories are very comprehensive. It is specifically undertaken that the churches shall not be demolished nor shall any injury be done to them, nor shall any encroachment be made on the areas adjoining those places of religions services. Freedom of religion is assured by the stipulation that there shall be no compulsion on them in respect of their religion. As the Christians believe that he Jews had killed Jesus on the Cross and the event had taken place at Jerusalem, as a concession to their religious sentiments they were assured that no Jews would be permitted to reside in their midst. Rumis had fought the Muslims and were their real enemies. However, they were permitted to live in the city if they so desired, or go away if they so wished, but in both cases they could have the guarantee of safety for themselves and their properties and their churches or places of worship. Even the Christians of Jerusalem were permitted to go away and join the Rumis if they so desired. They would interfered with nor molested, and the Churches they would leave behind in Jerusalem would be safe. A more just and magnanimous treatment of a conquered people by conquerors cannot be cited from the annals of any other nation.

---

[313] See Abu Ja'far. Jarrir, Tabari. Tarikh, on Fath Bait-ul-Muqaddas.

A fact which must be remembered in this connection, is that the lives and properties of the Dhimmis were put on the same level with those of the Muslims. If a Muslim murdered a Dhimini, he had to pay for the crime with his life. Imam Shafi'i reports that when a member of the tribe of Bakr b. Wa'il slew a Christian of Hira, 'Umar ordered that the murderer should be handed over to the heirs of the slain.[314] Accordingly, he was handed over to Husain, a relative of the slain, who put him to death. As regards the security of property, the lands where left in the possession of the old occupants and Muslims were forbidden to by them, as has been stated more fully in the chapter on land revenue.

Assessment of the *Dhimmis*

The land revenue assessments on Dhimmis wer very light. Still 'Umar was ever anxious lest they suffered any hardship and thought of them even on his deathbed. It was his practice to invite, every year when the collections from Iraq arrived at Madinah, ten men from Kufah and ten from Basrah and made them swear four times that on hardship has been inflicted on the people in making the collections.[315] Two or three days before his death, 'Umar sent for the settlement officers, talked with them about the assessments and asked again and again whether the assessments were fair and not harsh.[316]

Consultation with the *Dhimmis* in Administration of their Matters

Participation in civil administration is a very valuable privilege which a subject people can obtain, and 'Umar always consulted the Dhimmis in matters of administration concerning their welfare and took no step without obtaining their consent beforehand. When the settlement of Iraq was taken in hand, Persian landlords were invited to Madinah and consulted with regard to revenue assessments. In the settlement of Egypt the Maqauqas was usually consulted.[317]

---

[314] Al-Daraya fi Takhrij al-Hidaya, Delhi edn., p.360

[315] Kitab-ul-Kharaj, p.65

[316] Ibid.,p. 21

The security of life and property granted to the Dhimmis was not a mere paper affair, but was strictly enforced. Once a farmer of Syria complained that the Muslim army had trampled down his crops, 'Umar had him indemnified with one thousand dirhams out of the public treasury.[318] Instructions were sent to district officers again and again that the Dhimmis should be treated kindly, and no hardship should be inflicted on them. He also exhorted them to the same effect repeatedly in person. Qadi Abu Yusuf relates in Kitab-ul-Kharaj, in the chapter of Jiziyah, that when 'Umar was returning from Syria, he saw at a place a number of men standing in the sun and oil being poured on their heads. He inquired why they were being subjected to such an inhuman punishment and was told that they had not paid their Jiziyah and were being punished for the default. The Caliph asked what was their plea for their failure to pay the tax, and they replied "poverty". "Let them go," ordered the Caliph, "and do not torment them, for I have heard the Apostle of Allah say: 'Do not torture people, for those who torture their fellow beings will be tortured by Allah on the Day of Judgment."

Fulfillment of Terms with the Dhimmis

the Apostle of Allah openly. The terms with them are that they may do what they like in their churches, and if an enemy invades their country, we should fight for them, and no burdens should be laid upon them they cannot bear." Amr said it was ture.[319] The The instructions 'Umar sent to Abu 'Ubaida on the conquest of Syria contained the following words:

> "Forbid the Muslims to do any injustice to the Dhimmis. They should not harm them in any manner, not eat their substance unjustly. And keep faithfully all the terms you have made with them."[320]

---

[317] Maqrizi, Vol. I, p.74

[318] Kitab-ul-Kharaj, p.68

[319] Usd-ul-Ghabah, on Ghurfa.

[320] Kitab-ul-Kharaj, p.82

The Caliph made a detailed testament from his deathbed for the guidance of his successors. The testament is quoted in full by Bukhari, Abu Bakr Baihaqi, Jahiz and many historiographers. The last sentence in it runs as follows:

> 'And my bequest to my successor is in respect of those who are in the protection of Allah and His Apostle (namely, the Dhimmis) that the covenants with them should be observed faithfully, that they should be defended against invaders, and no burdens exceeding their strength should be laid upon them".[321]

What more proof could 'Umar give of anxiety for the well being of the Dhimmis than by thus thinking of them even on his deathbed?

A Christian abused the Holy Prophet in the presence of Ghurfa, a Companion, who slapped the culprit in the face. The Christian complained to 'Amr b. al-'As, the governor of Egypt, who sent for Ghurfa and questioned him about it. Ghurfa told his story, to which 'Amr b. al-'As said, "You know we have concluded a treaty with the Dhimmis." "Allah forbid," replied Ghurfa, "they were never permitted to abuse incident shows how scrupulously the rights of Dhimmis was respected.

Freedom in Religious Matters

The Dhimmis had complete freedom of religion. They were at liberty to perform their religious rites, ring their bells, take out the cross in procession and hold religious fairs. The rights and privileges of their religious leaders were retained as before. Benjamin, Patriarch of Alexandria, had been roaming about from fear of the Rumis for thirteen years. When 'Amr b. al-'As conquered Egypt in 20 A.H., he sent the Patriarch a guarantee of safety. The Patriarch accepted it with gratitude and returned to the Patriarchate throne in peace.[322] Freedom of religion was stipulated expressly in treaties among other terms. The relevant sentences of some of the treaties are quoted below. The writ of Hudhaifa b. al-Yaman to the people Mahdinar contained the following words:

> "They shall not be required to change their religion, nor shall any interference be made in their religious affairs."[323]

The following terms were granted to the inhabitants on the conquest of Jurjan:

---

[321] Sahih Bukhari, Meerut edn.,p.187

[322] Maqrizi, Vol. I, reports the event in details; see p. 492

[323] Tabari, p.2633

> "Their lives and properties and religion and laws are safe, and no change shall be made in them."[324]
>
> The treaty of Adharbaijan contained the following stipulation:
>
> "Their lives and properties and religion and laws are secure."[325]
>
> The treaty of Muqan contained the following words:
>
> "Their lives and properties and religion and laws are safe."
>
> 'Umar was very anxious for the propagation of Islam and made great efforts in this regard. As Caliph, it was his duty, and he did it only to the extent of exhortation and persuasion. Beyond that, he made it clear several times that nobody could be compelled in the matter of religion. He exhorted his personal salve, Astiq, a Christain, frequently to embrace Islam, but when he refused, 'Umar could only say in the words of the Holy Qur'an, "There is no compulsion in religion."

Equal Civil Rights to Dhimmis and Muslims

The truth to which facts lead one is that in the matter of civil rights "Umar made no distinction between the Dhimmis and the Muslims. If any Muslim used offensive language towards a Dhimmi, he was duly punished. Dhimmis were required to pay no other taxes than Jiziyah and the customs duties. On the other hand, Muslims too had to pay Zakat, which was heavier than Jizyah. Muslim too had to pay customs duties, though at a lower rate than the Dhimmis. The stipends which the Muslims received from the public treasury were also shared by the Dhimmis. One particular regulation clinches the matter. A Muslim who became unfit or was too old to earn his living received maintenance allowance from the state treasury.

Similar or rather more generous treatment was meted out to the Dhimmis. The rule had been made during the Caliphate of Abu Bakr. The terms granted by Khalid b. Walid on the conquest of Hira contained the following:

> "I have granted them the right that when a man becomes unfit to work because of old age or visited by some calamity or misfortune or having been wealthy he becomes poor, so that he becomes an object of charity to his co-religionists, he will become exempt from

---

[324] Tabari, p. 2258

[325] Idid.,p.2662

> Jiziyah and he and his family will receive maintenance allowance from the public treasury, as long as he resides the Muslim country. But if he goes out to another country, the Muslims will not be responsible for the maintenance of his family."[326]

The same rule continued in the reign of 'Umar and, what is more, he fortified by basing it on a verse of the Holy Qur'an and wrote to his treasury officer that in the Qur'anic injunction "Charities were for the poor and the needy"; "the poor" meant the Muslim poor and "the needy" meant the poor among the Jews and the Christians. It is related in this connection that 'Umar once saw an old man begging and asked him why he was doing so. The old man replied that Jiziyah had been imposed upon him whereas he could not afford it. 'Umar took him home, gave him some cash and sent him to the treasury-officer with the word that such old people who could not earn their living should be supported from the public treasury, adding with reference to the Qur'anic injuction quoted above: "By Allah, it is not just that we should benefit from the youth of the people and turn them out to beg in the streets in their old age."[327]

Honour and Self-Respect of the Dhimmis Maintained

Equal regard was paid to the honour and self-respect of the Dhimmis as those of the Muslims, and it was considered improper to utter words of contempt or disdain towards them. Umair b. S'ad, governor of Homs and distinguished for piety and holy living among all the officers of the empire, once lost his temper and the words "May Allah bring you to disgrace!" escaped his lips about a dhimmi. The governer there upon was so stricker with shame and remorse that he straightway went to the Caliph and resigned his post, saying it was the office that had made him behave so."[328]

Treatment of Dhimmis Conspiring or in Revolt

One noteworthy fact about Umar's Caliphate is that if the Dhimmis ever made any conspiracy or rose in rebellion, the usual favours were not withdrawn from them. Modern governments that claim to be civilized and advanced are gentle towards their subjects only so long as they do not suspect any political ambition on their part. Political activity on the part of the subjects at once changes their gentleness into ferocity and is so ruthlessly revenged that savages could not do worse. None of these things, however, ever moved ʻUmar to stray from the path of justice by a hair's breadth. On the border of Syria and Asia Minor was situated a city called ʻArbsus. When Syria was conquered, this city also passed into Muslim hands, and the treaty of peace was signed. But the inhabitants of ʻArbsus maintained secret relations with the Rumis and kept them informed of movements of this side of the border. ʻUmair b. S'ad, the governor, reported the matter to ʻUmar. The only punishment the Caliph awarded for their base treachery was that he wrote to ʻUmair to make an inventory of all their property, lands, cattle and other chattels, purchase them at double their price and tell the people to leave the Muslim territory and go away wherever they liked. If they would not agree to it. ʻUmair was to give them respite of one year; but if they did not mend their ways even then, they were to be exiled. As they would not mend their ways, the orders at last had to be example of leniency of forbearance?

---

[326] Kitab-ul-Kharaj, p. 85

[327] Ibid., p.72.

[328] Izalat-ul-Khifa', p. 203

One most eloquent proof of the generosity toward the Dhimmis is afforded by their own conduct towards their Muslim conquerors. The Dhimmis sided with the Muslim on every occasion against the governments of their own co-religionists. It were Dhimmis who provided food stores for the Muslim armies, held markets in the army camps, built roads and bridges under their own supervision and at their own expense, and above all rendered espionage and intelligence services. They informed the Muslims of the secret movements and plans of the enemy, although they were their own co-religionists, Parsis or Christians. To what degree the Muslims had won the hearts of the Dhimmis by their kindness and generosity of treatment may be judged from the fact that when the Muslims had to withdraw from Hims to fight the battle of Yarmuk, the Jews-swore on the Torah that so long as the breath of life was in them, the Rumis would not enter the city, and the Christians announced in truthfulness that the Muslims were more welcome to them than the Rumis.

Allegation of Unjust Treatment of the Dhimmis

We now proceed to examine the truth about those occurrences on the basis of which people have been or can be led to suppose that ʻUmar or Islam itself did not deal justly with the Dhimmis.

The following reasons may be advanced in support of this supposition. ʻUmar ordered that the Dhimmis should not imitate the Muslims in dress. They should wear waste-belts and long caps, have saddles to their horses, should not build new houses of prayer, nor sell wine nor swine flesh, nor ring bells, nor take out the Cross in processions. The Bani Taghlab was also commanded not to baptize their children. Moreover, he did not permit a single Jew or Christian to live in Arabia and compelled families who had lived in Arabia for centuries to abandon their ancient homes.

These objections call for a careful examination, and we will examine them here in a fair detail, for a long established traditional prejudice has cast a veil on the face of reality. It is true that 'Umar forbade the Muslims to copy the non-Muslims and the non-Muslims to copy the Muslims. But his purpose was to maintain the national characteristics of each people. In the matter of dress one has to inquire whether the dress of Caliph prescribed for the Dhimmis was their own ancient national dress or whether he devised some new dress for them for the purpose of humiliation. Anyone acquainted with the ancient history of Persia will readily see that the dress mentioned here was the same old dress of Persia. The treaty concluded with the Dhimmis, quoted in Kanz-ul-'Ummal, though it has been more or less shortened by the reporters, while it included the stipulation that they would not wear such and such kind of dress, also contained the words, "We shall wear the dress we have always worn."[329] It is obvious, therefore, that the dress prescribed for them by 'Umar was the same old dress of Persia.

Our jurists have erred with regard to Zunnar mentioned in the Caliph's farman. They think it was a cord of the thickness, of a finger like the sacred thread that Hindus wear, and that it was intended to humiliate the Dhimmis. But it is a great error. Zunnar means a belt, and the word has the same meaning in Arabic to this day. A belt is also called Mantiqa in Arabic, so that Zunnar and Mantiqa are synonymous. That, they are synonymous is proved by the books of Hadith. Kanz-ul-'Ummal reports from Baihaqi and others that 'Umar wrote to the army commanders: "Make it obligatory for them to wear *Mantiqas*, that is Zunnars."[330] The Zunnar is also called *Kastij* and the word is probably of Persian origin. In any case, the Persian wore a belt from ancient times. Mas'udi says in Kitab ul Tanbih wal Ashraf[331] that he has explained the reason for this ancient habit of Persians of wearing belts in his book Muruj-al-Dhahab. Another proof that the dress of Persia may be seen from the fact that the dress prescribed by Caliph Mansur for his court was very nearly the same. The tall caps made of straw were the same ancient headgear of Persia, the like of which may be seen even today on the heads of the Parsis. Mansur's court dress also included the belt. Arab historians state expressly that the dress prescribed by Mansur was in imitation of the Persians. It is evident, therefore, that if the dress prescribed by 'Umar for the Dhimmis had been some new invention devised for the humiliation of the latter. Caliph Mansur could not have adopted it for himself and his court.

---

[329] Kanz-ul-'Ummal, Vol.II, p.302

[330] Vol. I, p.320

[331] P.108

Precluding the Dhimmis from building new houses of worship, selling wine, taking out processions of the Cross, ringing bells and to baptize their children constitute an example of interference with religion, but I contend without fear of contradiction that the conditional restrictions prescribed by Abu Bakr and 'Umar were perfectly justified. Later historians ignored the conditions and thereby gave rise to a widespread error.

The permission in respect of the procession of the Cross conceded in the treaties was qualified by the proviso that "they shall not carry the cross in Muslim habitation."[332]

About ringing the bells, the terms were: "The Dhimmis may ring their church bells at any time during the day or the night, except at times of Muslim prayers."[333] About swine, the words were: They shall not drive the pigs into Muslim quarters."

It is obvious, therefore, that procession of the Cross, ringing of bells, etc., were forbidden not absolutely, but under certain circumstances, and these prohibitions under similar circumstances could not be regarded as unjust even today.

The most serious charge concerns the alleged prohibition to the Bani Taghlab, who was a Christian tribe, to baptize their children. It is customary among the Christians to baptize their children before they come of age so that they should grow up as Christinas, atmost the same as Muslims circumcise their male children. Doubtless, 'Umar had no right to forbid baptism, but a new question had cropped up in his days: If a man belonging to a Christian tribe, embraced Islam and died leaving young children behind, in what religion would the latter be brought up? Would they be treated as Muslims or would their Christian relations have the right to baptize them and bring them up as Christians? 'Umar commanded that in these particular circumstances their relations should not baptize them and not bring them up as Christians. The order was quite fair, and the minor children of a Muslim would evidently be treated as Muslims. Tabari, speaking of this prohibition to the Bani Taghlib, quotes the following words from the treaty concluded with them: "They shall not Christianize the children of those who had embraced Islam."[334] Similar words are cited elsewhere also by the same author.[335]

---

[332] Kitab-ul-Kharaj, p. 80

[333] Ibid.,p.68

Perhaps someone might object that 'Umar should not have made this stipulation on a hypothetical basis, but the fact is that the situation was not hypothetical. Many persons from among the Bani Taghlab had embraced Islam and it was necessary to insert a proviso in the treaty to safeguard interests. Tabari says[336] expressly that it was those new converts from among the Taghlabites who themselves had proposed the condition.

Anyone can, therefore, decide for himself whether to forbid the Christians, in the interests of public peace and order, to carry the Cross and drive pigs into the midst of the Muslims, to ring bells at times of public prayers and to baptize the children of Christian converts to Islam can be construed as the result of religious prejudice. It is a pity, however, that later historians disregarded to mention of the particular conditions and circumstances in each case, and even those among the older ones who were themselves fanatically inclined ignored them in their reports. This led to serious errors, but being apparently of a minor character were overlooked by Ibn al-Athir and others. But the error that had arisen in this way gradually became so common and widespread that the whole Arabic literature got offered by it, and as the jurists had little knowledge of history, they accepted these mangled reports without question and derived legal dicta therefrom.

Expulsion of Jews and Christians

As to the expulsion of Jews and Christians from Arabia, it is a fact that Jews had never been really friendly towards the Muslims. The Jews of Khaibar had been told on the conquest of the city that they would be turned out whenever the state thought it necessary to do so. Their enmity towards the state became more open in the reign of 'Umar. They threw his son 'Abdullah from the roof of a house and he sustained a serious injury in his arm. At last, 'Umar read out the whole catalogue of their rascalities in public assembly and ordered their expulsions. The Bukhari (Kitab al-Sharut) mentions the event in some detail.

---

[334] Tabari.,p.68

[335] Ibid., p.2510.

[336] Tabari, p.2609

The Christians of Najran lived in the vicinity of Yaman and were not interfered with. But they began secretly to prepare for war, for which they procured many horses and arms. 'Umar therefore ordered them to quit Yaman and settle in Iraq.[337]

Historical evidence is, therefore, decisive that the expulsions were ordered in pursuance of political necessities, and no exception can be taken to them, though the concessions made to the people at the time of their expulsion are worthy of note. When orders were given for the expulsion of the Jews of Fidak, 'Umar sent an expert to assess the value of their lands and gardens, and the price so fixed was paid to them from the public treasury.[338] The Jews of Hijaz were similarly indemnified for the loss of their lands.

The Christians of Najran were treated very generously when they were ordered to transfer their domicile from Arabia to Iraq and Syria. The safe conduct granted to them contained the following provisions:

> "In Iraq or Syria, wherever they should settle, the local government should give them lands for building their houses and for cultivation. To whomsoever among the Muslims they should apply for help, he should help them. They should be exempted from Jiziyah for two years."

As a precaution and for greater emphasis, a number of prominent Companions were made to witness the document, which is quoted in full in Qadi Abu Yusufs Kitab-ul-Kharaj.[339] What greater favour could be shown to a people whose guilt of conspiracy and rebellion stood proved?

Jiziyah

Now remains the questions of Jiziyah. By Maulana Shibh Nomani the question of Jizyah has been discussed in a separate booklet published in three languages; Urdu, English and Arabic. A brief statement would, therefore, suffice here. The meaning and purpose of Jiziyah had been explained early in Islam, that it was the price of protection, but in the reign of 'Umar its signification was put beyond the possibility of doubt. Firstly, following the example of Anusherwan, he fixed different rates of Jiziyah and thereby made it clear that it was the same old tax that Anusherwan had levied and was no new imposition. Secondly, he made it plain by his practice that the tax was in lieu of protection. It has been mentioned in the first volume that when, owing to the imminent and hazardous battle of Yarmuk, the Muslim army had to withdraw from the western districts of Syria and thought that they could no longer bear the responsibility for the protection of the inhabitants of the cities of Hims, Damascus etc, from whom they had already received the Jiziyah, they returned the whole amount so collected to the inhabitants and said that as they could no longer take the responsibility of their protection, they had no right to the tax. Another decisive evidence that Jiziyah was the price of protection is offered by the fact that when military service was received from any people, they were exempted from Jiziyah though they continued in their own religion. "Umar himself wrote to his army commanders of Iraq in 17 A.H., the inhabitants of the city were given the guarantee that "the people who would serve in the army in any one year would be exempted from Jiziyah for that year."[340] If any people particiapated in the wars of Muslims even once, their Jiziyah for that year was remitted. When Adharbaijan was conquered in 22 A.H., the inhabitants of the city were given the guarantee that "the people who would serve in the army in any one year would be exempted from Jiziyah for that year." This treaty concluded the following terms:[341] "The people of Armenia are bound to take part in every military expeditin, comply with every order issued by the governor on the condition that they shall pay no Jiziyah."

---

[337] Kitab-ul-Kharaj, p.42

[338] Futuh-ul-Buldan, p.29

[339] P.41

Jurjan was conquered in the same year, and the farman granted to them contained the following words: "We are responsible for your protection on the condition that you shall pay Jiziyah every year according to your means, but if we take military service from you, the Jiziyah will be remitted to you in return for the same."[342] In short, the purpose and signification of Jiziyah were established beyond doubt by the speeches, treaties and practice of 'Umar.

The disbursement of the collections of Jiziyah was confined to military expenditure, and the food, clothes and other necessities of the army were purchased with it. Accordingly, wherever Jiziyah was imposed part of it was collected in kind. The assessment per head of Jiziyah in Egypt was four dinars, of which two were collected in cash and the remaining two in the form of wheat, olive oil, honey and vinegar, which formed the food of the army at the time. Later on, however, when a separate commissariat department was established, the collections in kind were abolished and the whole amount of the Jiziyah. i.e., four dinars per head, began to be collected in cash.[343]

---

[340] Tabari, p.2497

[341] Ibid.,p. 2265

[342] Tabari

---

[343] Futuh-ul-Buldan, p. 216

CHAPTER 14

POLYGAMY

A dispassionate investigation and assessment of the objections raised against the familial law of Islam

In the sight of Islam, polygamy is not an improper practice. Under certain restrictions, it regards polygamy as lawful and harmless. The objection raised against it is that the human nature abhors it and demands a monogamous society. It is a great injustice to woman also that in the presence of one wife another may be brought as a rival to her-the co-wife as a life-long source of jealousy and heartburn. Therefore, to put an end to this iniquity many countries have put a legal restriction on it but it is into looked upon approvingly either. Probably, very few countries of the world do not stand in disfavor morally and legally though they do not actually frown upon it.

To begin with, it would be in the fitness of things to point out that it is not proper to make only Islam the target of criticism with reference to polygamy. For, if it is a crime Islam is not alone in committing it. Most of the nations of the world practiced it. It had the legal authority and moral sanctions of different religions and it was not regarded a crime or a sin. The ascetic religions, however, despised no only polygamy but also conjugal relations. Christianity coming into its own had taken to asceticism. In their misplaced enthusiasm, they permitted a religious minded man to have even one wife with disapproval. The Western society could not detach itself completely from the deep-set influence of Christianity even during the period of its high-sounding claims of the concept of monogamy but found it hard to swallow the concept of polygamy (in spite of their claims of freethinking and secularism). the nations in bondage of the Western colonizers started supporting the issue as if it was revelation for them and they became conscious of woman's greatness.

Man's Inclination to Polygamy

Let us first look at it from man's point of view. Undoubtedly, most men are content with one wife only. Still they alone can allege polygamy to be alien to the nature of man who have observed and studied that nature through the colored glasses supplied by the West. It is an undeniable fact that man is naturally inclined to polygamy. Even if he remains contented with one wife, if the society closes the doors of polygamy for him, one cannot rule out that he is free from any such tendency. If we close the doors of polygamy for those having a strong sexual urge, there is a great danger of their seeking gratification of that unusual urge by illicit means (out of wedlock). We have before us the experiment of the West with strict legally binding monogamy and its disastrous results. Rejecting polygamy, it had to put up with fornication and illicit sex in all its other heinous forms. There in the West "one man, one wife" may be the legal order in their society, but how many mistresses, stenos and secretaries and the so-called girl friends are associated with one man he only knows! In addition, these women remain deprived of all those rights enjoyed by the legally wedded wife (even co-wife).

Polygamy Is Man's Need

Polygamy is not only a tendency of man but also his need. Desire of sex is a natural urge. One woman cannot meet the abnormally frequent demands of sexual gratification by the highly sexed individuals and those whose passions are uncontrollable. For she is prone to her period with its disability for several days every month, post-parturient bleeding disables and enfeebles her when she is psychologically unfit for sexual union, advanced pregnancy and delivery being her other periods of disability. She regularly passes through these phases when her passions are at the lowest ebb. During these phases, she herself is not normal and unable to respond positively to her husband's advances. The other aspect of it is that cohabitation during these periods is detrimental to the health of both of them, besides being abhorrent to human nature. Also, Sex during pregnancy is deleterious for the child's health. Experience has shown that sentimentality in this matter on the part of the married couple adversely influences the moral build-up of the child born to them. Pregnancies, childbirths, and breast-feeding thoroughly shake her physical health, her body reserves deplete and early signs of senility overtake her much earlier than the husband who is not prone to any of a woman's debilitating phenomena. He finds himself much younger in both physique and spirits. Compelled by these reasons, if a person is not contended with one wife and seeks another one under the sanction of Law, he is in no way blameworthy. It would be unjust even cruel to condemn and oppose him. He should, however, be compelled (through social pressure) to meet his obligations to both of them justly and neither should be neglected with impunity.

Polygamy : an Advantage to the Woman

Now looking at the problem from the woman's point of view we discover that in some situations polygamy becomes beneficial to her, a blessing in disguise.

1. The desire for progeny in man is natural (said to be the manifestation of the suppressed desire for survival or immortality, which somehow appears partially fulfilled through continuity of the family as well as partial projection of himself through progeny). If somebody discovers that his wife is physically or psychologically barren and completely incapable of bearing children, he has two options open to him: he may retain the barren one and wed another, and the other course lies in divorcing the first and then taking another partner. Apparently, in rare cases only the second alternative would be acceptable to any woman.

2. The wife may be a chronic patient of some incurable malady or be disabled due to some serious disorder peculiar to her sex; would it not then be beneficial to the disabled wife that the husband takes another while retaining his ailing life-partner?

In all such situations it would be a grave injustice, rather, height of cruelty to the first wife if the husband is compelled by the law of the land to divorce her before opting for another match. This compulsion becomes even more abominable when she shows her willingness to live under the husband's protection and he too is reluctant to throw her out to fend for herself.

Polygamy as a Social Need

Under certain circumstances, polygamy becomes a necessity for the society itself. Two of such circumstances might be the following ones.

1. Under normal conditions nature maintains the balance in the number of males and females born anywhere on earth. However, in the event of a

country suffering tremendous loss of life on the battlefronts, the male population greatly reduces, particularly the younger men of marriageable age since it is they who largely become the gun-fodder, thus greatly distorting the balance and leaving female population far in excess of the males. One solution of the catastrophic problem lies in leaving the young widows and unmarried women to rot and go on suffering in silence, or to take to the path of sin and create sexual anarchy and moral turpitude, their shouldering passions making them an easy prey to the lascivious and the dissolute. No healthy society worth the name can put up with this abominable state of affairs.

2. Manpower plays an important role in the life of nations. It has basic importance in the country's defense, industries, agriculture and other multifarious social services to promote the country's interests. Under certain peculiar conditions and in delicate situations their importance becomes manifold. Polygamy is also one of the ways of adding to the numerical strength. Women are overtaken by menopause at forty of thereabout, whereas men are fit at seventy or even later in exceptional cases. That means man's second marriage, once his partner has become defunct, may start a fresh chain of births, thus adding to the manpower of the nation. That is why the nations standing in sore need of greater manpower have to compromise or even encourage polygamy in the national interest.

Woman cannot Put up with Polyandry

Some people may assert that if the male of the human species enjoys the privilege of polygamy, would it not be in the fitness of things that people also recognize the right of the females of polyandry having more than one husband at a time?

However, even if she were thus "privileged" she would never have the temerity to benefit from it. The custom of polyandry does exist in some uncivilized or semi-civilized tribes in India and elsewhere too, but the cultured and civilized world has never accepted it. The civilized human society has rejected it once for all.

Woman's nature points to the facts that she can become the wife of only one husband at a time. Polyandry or multiplicity of partners in bed is abhorrent to her nature.

Woman bears the burden of familial responsibilities. She has taken upon herself the most onerous ones. She undergoes the pangs of pregnancy, delivery and suckling the babies. She is so often obliged to discharge duties in the world outside. How can it be possible for her to submit herself to the sexual demands of several males? It would simply mean the ruine of her health. The practice can also give rise to sexual and mental disorders. Experience has shown that women having extramarital relations (many at a time) are often victims of maladies pertaining to sex, and no more fit for life as respectable homemakers.

Polyandry may also create a certain social problem. A healthy male given to polygamy may impregnate all his wives. All the children shall be his. However, a polyandrous woman having sex with all her husbands can conceive only through one of them at a given time. Once she has conceived, intercourse with others is not going to contribute in this behalf at all. However, a very delicate problem arises when it comes to decide the paternity of the child. Who is going to determine it and how? Maternity is a matter of certainty but not so the paternity- it will remain a matter of doubt (unless all avenues are closed on suspicions and uncertainties)! All that can be said is that the child is (his or hers) mother's son or daughter a real stigma in respectable society, and a most disturbing and embarrassing situation for such indeterminate and unidentified progeny. Who is going to support, educate, and make him or her heir or be his/ her legatee? There are many other questions, which are difficult to answer in the existing familial system, headed by a male, recognized and accepted by the civilized world then as now.

The system of polyandry can deleteriously affect the society also, as it is known to all.

1. It is inherent in the nature of human male, however immoral and corrupt, that he cannot for a moment put up with another male having anything to do with his wife. Several males having a common female as their partner in bed, must be deadly jealous, each one of all the rest. They become bloodthirsty in establishing exclusive claim over her and the results of any conflict in getting sole possession of her may be very tragic indeed. Their tussle and constant fighting for her become unbearable for the woman herself and her peace of mind departs. It may be asserted that the same can be said of polygamy since each one of the co-wives is hell-bent on damaging the cause of all the rivals in her striving for the sole possession of the common husband and his exclusive love and attention to her.

This is undoubtedly true beyond doubt. Despite this, a woman's reactions to it, compared with those of man are no so strong and the results too are not so serious and disturbing. May be one of the causes of this difference is that she consciously or unconsciously regards the institutions of polygamy justified and pardonable.

2. A woman is inherently more modest. This feeling is natural to her and emerging automatically from her. For all the sustained and laborious efforts of the immodest West, this strong sense in her has so far kept at bay the agents of evil. They could not wipe it out completely even in the West. It is due to this deterrent that she does not give loud expression to her passion for sexual gratification and openly invite the opposite sex for the satiation of her shouldering passions. This sense of concealment of her feelings has benefited human society in a big way. She cannot go headlong with temerity to create anarchy in sex, very oblivious of the consequences. Sex relations with more than one man badly injure or destroy this restraining factor of her character, and gradually she becomes totally devoid of any sense of modesty and chastity.

The female of the human species once denuded of her sense of modesty and self-prestige based on chastity, the society rushes headlong towards the abysmal depths of degradation because of sexual anarchy.

Polygamy does not for Debauchery

Let us now consider the objection that polygamy is also a clever contrivance for debauchery. It provides man with total freedom to sexual gratification at will. That is why capitalists and feudal lords gathered around them hordes of women of their choice and spent their lives in the pleasant company of fairies (in their self-made paradise). Islam in recognition of polygamy has supported and endorsed this very corrupt order (feudalism) and opened avenues for lasciviousness and debaucher that a person may wed any woman whenever he likes and when he has reached the permitted number, four, he may divorce one of them and replace her by another beauty. He may even divorce all the four at once and bring in another fresh more elegant lot for his fairyland.

This objection holds well in the case of monogamy as well. Whoever desires may get rid of the old used one whenever another fresh and more charming damsel catches his eye and he takes a fancy to her, and he can adorn his luxury chamber repeatedly. However, only one who closes his eyes to the very patent fact that a dissolute person in invariably the most irresponsible person can raise such an objection. All that he cares for is his own pursuit of "good times." He does no like to burden himself with any responsibility. All those who opted for a life of disapproved of the restrictions of married life. If at all they adopted it under social pressure, they never met their obligations in this behalf. The Islamic way of life overburdens one with responsibilities. Polygamy increases this burden many times over. Islam imposes so many responsibilities and restrictions on him that without a dire need he cannot think of more than one wife at a time.

Justification of Polygamy

The glorious Qur'an mentions polygamy in the context of upbringing of the orphans and of the protection of their rights.

وَإِنۡ خِفۡتُمۡ أَلَّا تُقۡسِطُواْ فِي ٱلۡيَتَٰمَىٰ فَٱنكِحُواْ مَا طَابَ لَكُم مِّنَ ٱلنِّسَآءِ مَثۡنَىٰ
وَثُلَٰثَ وَرُبَٰعَۖ فَإِنۡ خِفۡتُمۡ أَلَّا تَعۡدِلُواْ فَوَٰحِدَةً أَوۡ مَا مَلَكَتۡ أَيۡمَٰنُكُمۡۚ ذَٰلِكَ أَدۡنَىٰٓ
أَلَّا تَعُولُواْ ٣

> "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable to prevent you from doing injustice."[344]

Commenting on this verse, the exegetes maintain what the Traditions also corroborate that on occasion the guardians of the orphan girls used to marry them lured by their assets or swayed by their beauty but were guilty of default in the payment of Maher. This was gross injustice and Islam asked them to desist from it. It allowed marrying them only on full payment of Maher. It also conceded to them the right to marry other women, besides the orphaned girls under their control.

---

[344] Al-Qur'an 4: 3.

The fact of the matter is that the heart of a believer is essentially sensitive to the feeling of injustice. That is why it is stated: if you are mortally afraid of being inadvertently unjust to the orphaned girls, then spare them and marry other eligible women who impress you.

Another interpretation is if you fear that you may not render justice to the orphaned girls then marry those of their widowed mothers with whom marriage is legally permissible. This permission may facilitate the rendering of justice easy.

This verse highlights the background in which permission for polygamy is given and which contains the refutation of the objection pertaining to the theme of polygamy too.

Legal Restrictions

The mode of thinking and temperament that Islam wants to create, if inculcated in the right spirit, cannot allow a man to tolerate for a moment a life of dissoluteness and debaucher. This is, however, irrelevant to our discussion here, and we are mentioning here some of the legal restrictions that Islam imposes in connection with polygamy. They will give an idea that Islam far from opening avenues on polygamy has actually created great barriers in its ways.

Limitation of Four

Before the advent of Islam, polygamy was the common practice and Arabia in this regard was no exception. Some people wedded as many women as they pleased, maintaining an entire harem at times and tyrannized them. Islam put a ban on more that four at a time. It recognizes and assents to polygamy as a personal and social need but is not prepared to accept a situation where man needs more than four wives. It declares it improper and prohibited. Whoever exceeds the prescribed limits of four, Islam shall proceed legally against him. In this way, it has put a ban on unlimited number of wives more that four, then in vogue and prevented the practice for future.

Only Permission, not an Injunction

Some people present polygamy as if Islam had ordained it an as if the Muslim, who may or may not be observing its other injunctions, is compulsorily following this particular ordainment. One wife cannot meet his needs. He must always have four of them to embellish his bedchambers.

In this connection, we would like to inform such misinformed people that the idea that all Muslims or at least a great majority of tem practice polygamy is erroneous and baseless. Among millions of Muslims, there may be only a few having more than one wife. It is not just our guesswork. Data collected through authentic survey contradict the opinion that all Muslims practice polygamy. They only prove that in this context, compared with Muslims, the proportion of people from other communities is much more.

Secondly, this verse (4:3 makes the other impression that Islam has ordained it equally baseless. That is a matter of leave in case of dire nee and not an injunction of the Islamic Shariah. By abstaining from it all his life a Muslim shall no be guilty of any sin of omission and lacking in piety or religiosity by any standard of judgment.

Thirdly, this verse (4:3) and other teachings of Islam have not encouraged polygamy. It did not persuade and urge its followers in this behalf. Rather, it pointed out its complex responsibilities so that thy may give it serious thought before plunging into it. He should never adopt it as a means of satisfying his lust.

Fourthly, this verse (4:3) refutes the idea that polygamy is a means of luxury and enjoyment alone. It can also be a means of sympathy and helpful attitude. Suppose there is a young girl remaining unmarried (not finding a suitor), or one being widowed in the prime of life and with no one to support her. If a person marries her as his second wife out of sheer sympathy and compassion, can one term this act of his condemnable or he be regarded guilty of lustfulness?

Some Conditions and Safeguards

The person, taking advantage of the leave granted to him by Islam and intending to wed another wife in the presence of the first, faces the following restrictions against-benefiting from the permission.

1. Maintenance and residence of the second wife along with that of the first wife must be easily within his means. Some jurists are of the opinion that

if she is not prepared to live with his first wife, he will have to provide a separate living space for her.[345]

2. He must physically be capable of properly maintaining conjugal relationship with both. The jurists have discussed in detail its legal aspect and the interval between two performances of intercourse. Apart from this, one of the objectives of nikah is the protection of modesty and chastity. That is why many jurists have written that the interval between one sexual act and another should not exceed four months. This is supported by a decision of the period of 'Umar (may Allah be pleased with him), the Second Rightly-Guided Caliph.[346]

Imam Ibn Taimiyah says that a person should cohabit with his wife according to the common usage among nice well-behaved people. This is as much important. He goes on to add, "according to some, copulation once in four months is binding on the husband. Some others have said that it depends on the desire of the woman and the sexual power of man. And this appears to be reasonable.[347]

Allamah Ibn-e-Arabi Maliki says:

> If a person financially and physically is capable of meeting his obligation, he may wed four women. In case of incapability he must rest contented with just as many as he can easily support and satisfy sexually.[348]

That means a person incapable of meeting the challenges of polygamy must content himself with just one wife.

3. Even if a person is financially and physically capable of the second marriage, he is bound to maintain just balance between them in all matters where equality is possible in practical life, namely, the matter of maintenance, dress, residence and spending the night with them. Equity and justice are the real spirit in the Islamic order of mutual dealings. It

---

[345] Raddul-Muhtar Alad-Durril- Mukhtar: 2/212-212.

[346] Al Mughni Le-Ibne Qudamah: 7/30, 31. Raddul-Muhtar Alad-Durril - Mukhtar: 2/546 -547.

[347] Fatawa Ibn-e-Taimiyah: 32/217. Print 1398 A.H

[348] Ahkamul-Qur'an, Ibn-e-Arabi: 1/130.

has associated so much importance to justice in the matter that even if there is a lurking doubt about his maintaining the correct balance in his dealings with them, he has been directed to remain content with only one wife.

The Qur'an says:

فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً

> "But if you fear that you shall not be able to deal justly (with them) then only one." [349]

Allamah Abu Bakr Jassas Hanafi syas that if a person fears that he cannot deal justly with all the four wives he should come down to two, and if that too is not possible, he should keep only one.[350]

In traditions of the Prophet (P.B.U.H.) there is serious denunciation of husbands for failure in the matter of just dealings between the wives. Abu Hurairah (may Allah be pleased with him) reports the Prophet s.a.w. to have said:

> A person having two wives, failing to maintain balance of justice between them (leaning towards any one of them) shall come on on the Day of Judgement with half of his body inclined (to one side) or paralyzed.[351]

To maintain equality and just treatment between the wives in all those matter, lying within his power is binding on him. It is not, however, possible for him to love all of them equally. His heart may be more inclined to one than to others. Similarly, equal sharing of bed and copulation with all of them is not practically possible. It depends so much on the desire (sex-urge) and preparedness (both mental and physical). It is among those things over which he has no control.

---

[349] Al Qur'an 4:3.

[350] Ahkamul-Qur'anJassas: 2/64.

[351] Mishkat-ul-Masabih, Kitab-un-Nikah, Babul Qasam, with reference to Trimize, Abu Da'ood, Nisai, Ibn Majah, Darimi.

'Ayeshah (may Allah be pleased with her) reports:

> "The Prophet used to distribute those things among his wives justly that could be divided easily. After that, he used to say, 'O Allah! I have divided those things over which I have control. Those over which you alone has control and which do not lie in my power (love and other sentiments), in case of any discrepancy in these matters, do not hold me answerable.[352]

However, it does not mean either that in the name of love or cordiality one should incline so much towards any one spouse that it may result in oppression and excesses to wards others, and they, having a husband may be pushed to live as though they were without one. The Qur'an explicity interdicts it saying:

وَلَن تَسْتَطِيعُوٓا۟ أَن تَعْدِلُوا۟ بَيْنَ ٱلنِّسَآءِ وَلَوْ حَرَصْتُمْ ۖ فَلَا
تَمِيلُوا۟ كُلَّ ٱلْمَيْلِ فَتَذَرُوهَا كَٱلْمُعَلَّقَةِ ۚ وَإِن تُصْلِحُوا۟
وَتَتَّقُوا۟ فَإِنَّ ٱللَّهَ كَانَ غَفُورًا رَّحِيمًا ﴿١٢٩﴾

> "You are never able to do justice between wives even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air)."[353]

4. Just as the second wife is entitled to all those rights and privileges enjoyed by the first wife, so shall the children of the latter have equal rights with those of the progeny of the two legally wedded wives. The responsibility of all these restrictions and conditions comes to the shoulders of the person benefiting from the leave granted by Islam to take to polygamy.

The fact is that according to the teachings of Islam it is not easy to have more than one wife. However, under certain personal and social conditions granting the leave of polygamy is of greater utility than putting a complete ban on it. That is the reason why Islam permits it.

---

[352] Mishkat-ul-Masabih, Kitab-un-Nikah, Babul Qasam, with reference to Tirmizi, Abu Da'ood, Nisai, Ibn Majah, Darimi.

[353] Al Qur'an 4: 129

Family Planning and Islam

Family planning is not a new concept it is rather a newly coined term for an old idea. In various periods of history man has looked with apprehension upon the limitless possibilities of growth in population as compared to the possibilities of limited expansion in the supply of resources available. This fear has time and again been expressed that if the human progeny multiplies unrestrictedly where would they all live and what would they eat. Formerly this fear was expressed in a simple form but modern prophets of doom have tried to explain the matter statistically, in terms more horrifying and breath-taking. Some of them plead that while population rises in geometrical progression, our means of livelihood, no mater what methods are used, could only rise in arithmetic progression. In other words while population increased in the proportion of 1-2-4-8-16-32-64-128-256, the means of subsistence could be developed only in the proportion of 1-2-3-4-5-6-7-8-9-. It, therefore, follows that f human population is allowed to rise unhampered, it would go on doubling itself after every 25 years, and within a period of two hundred years only it would increase form 1 to 256, and the resources for living could be developed to 9. Within three centuries the proportion of population and resources would be 4096: 13, and after two thousand years all proportion would be lost. On the basis of these simple calculations various people, some engaging themselves to problems on the international plane and others confining themselves within those of their nation, express their great concern that if population of the world or of any specific area goes on increasing at this rate no amount of human effort would be able to accomplish a corresponding rise in means of livelihood. The consequences shall be that progress and development would become would become an idle dream, it would be difficult to maintain life as it is, and a time would come when there would be simply no room to exist.

This then is the nature of the problem. Man, in the by gone, resorted to infanticide, abortion and contraceptive measures. The modern man, although doesn’t feel hesitant to utilize the first two methods as well, but equipped with the latest scientific discoveries and techniques is devoting more of his attention and energy to the third method. He wants to make use of such drugs and appliances that may keep him virile yet be able to control or stop births as and when he deems fit. He is even prepared to use those devices that may make man or woman or both permanently sterile. This, he sometimes call, birth control, sometimes birth limitation, and sometimes uses a term like family planning and such other attractive names.

Fear of Economic Scarcity

1. This is the problem that is posed before us. But how far it real? On carful study and scrutiny it becomes clear that in the long course of human history, never did the human race multiply according to geometric progression as was claimed by the disciples of Malthus and Francis Place. Had it been so, human race would have been extinct long ago, leaving neither any problem for discussion nor the persons who would indulge in it!
2. There are certain things that are just taken granted. We assume their existence and seldom feel the necessity of pondering over them and trying to appreciate their purpose and significance. Take for example our earth. It existed long before man was before man was born. It contained all that was needed to support life on it and for the blossoming of human civilization in this regard is simply negligible. He did not create anything at all; he only utilized to his own advantage what already existed. He, of course, by dint of his intellectual powers and physical endeavors did discover hidden treasures of nature and put them to man's use. All the resources hidden which were needed to satisfy the necessities of the earliest settlers on the earth down to the varied and complex demands of the consumers in the present century have already been in existences. Perhaps, no one would doubt the fact that the resources needed to meet the future demands and requirements of human being also exist here, may that be on the surface of the earth or within the strata's deep down its bosom, in the air and the atmosphere or in the oceans deep. Man has neither created them nor does he have the authority to determine the place and the location, quantity and the quality, and period of time for its availability. We are at the receiving end, not the otherwise. However we may emphasize the role of man in discovery and utilizing these resources, the fact remains that he never created them. One may believe in God or just in the blind force called nature, he must come to the inescapable conclusion that whoever is responsible for bringing man upon this earth, He made provisions for all that man was to require in a manner and measures most judicious and appropriate.

It may also be pointed out that all these means and resources have not always been known to man. In the beginning man was aware only of water, earth, stones, natural plants and wild animals, and he could not think of other economic re sources than these. But as population grew he struggled and endeavored and by new and novel resources was discovered. The process continues in its gushing fury and seems unending and inexhaustible. He searched newer resources and at the same time he developed new methods and techniques for their utilization. Never in the whole span of human history there ever came a moment when human population continued to rise and the means of livelihood remained totally static. Man has time and again blundered in his assumptions and apprehensions; he has often thought that the earth has poured out all that it had and henceforth mankind has no new stores of resources to sustain his life. But every time the fear proved unwarranted and man found out that the world has yet to offer new and unexplored avenues to him. With the rising population many hitherto unknown resources have always been discovered which were formerly inconceivable. A few instances will elucidate the point.

For thousands of years before Jesus Christ (peace is upon him) man had been observing the steam coming out of is kettle when it was heated. But for more than seventeen hundred years after Jesus, no one had the least idea that in the latte half of the eighteenth century the same steam was going to open innumerable vistas for obtaining energy and this discovery will give rise to a chain of development of a revolutionary nature. Ever since the time of the Sumerian civilization, man knew about oil and its inflammable property, but till the latter half of the nineteenth century no one had thought that petrol was about to gush out from earth's bowels, and with it motor transport, aero planes and allied industries will bring about an economic revolution. Since time immemorial man was looking at the sparks of fire produced when two materials were rubbed with each other, but after thousands of years the secret of electricity was revealed to him, at a particular stage of history, and he become master of new source of energy that is rendering such a tremendous service towards the economic well-being of humanity, come thing it was not possible to visualize hundred and fifty years back. And also look to atom, which was a subject matter of discussion long before Jesus Christ (peace be upon him) was born, and the philosophers of the times were always giving their best thought to the proposition whether or not atom could be sub-divided still further. Who knew that this insignificant thing would burst and release such tremendous energy which would render all other sources insignificant? These instances refer to some of the changes that have occurred in the economic sphere within a period of last two hundred years. They have provided man with such amenities and comforts, and have equipped him with such means of livelihood, that were undreamt of in the eighteenth century. How stupid it should have been for a person to have his eyes on the economic resources of just his own period, and calculate on that basis that the existing resources shall not be able to meet the growing demand of our increasing population.

3. Those who calculate in this fashion not only commit the mistake of regarding the limited knowledge of their own age as adequate for thinking and planning about future but they also forget the basic fact that increase in population does not signify merely an increase in consumers but also in producers. Economics recognizes three factors of production; land, capital and labor. The main and decisive factor among these is man himself, but those wary of growth in population find it convenient to regard man as a source of consumption and not so much as a factor of production. They quite often ignore tat fact the man produces and can produce tremendously. They fail to grasp that all the progress achieved so far by man has been despite the simultaneous growth in population means increase in the number of producers. It also provides greater inducements to work. Increase in population not only opens newer vistas for action but also provides free impetus for greater effort. The growing requirements for food, clothing, housing and other necessities of life for more and more men is indeed the compelling urge that prompts him to expand the existing resources and infuses spirit in him for making discoveries and inventions and innovations in every walk of life. This urge is responsible for exploitation of barren lands, reclamation of marshes, forests and ocean beds, utilization of improved methods of cultivation, search for mineral resources, and human endeavors on earth, air and sea. Indeed human activities and endeavors know no limits primarily because of one factor: he wants more and more resources for living under the pressure of growing population. If this motivating force dies down all activity and dynamism of human spirit will give place to lethargy, laziness and dependence on whatever is available. It is this motivation indeed that prompts man one the one

hand to work more and more and on the other, to bring forth newer and newer workers.

The Phantom of Scarcity

1. It has been alleged that rise in population must necessarily result into the scarcity of economic resources, But the evidence and the disposal of man, despite the limitations of our knowledge and immeasurability of the hitherto hidden resources, proves otherwise. History of our recent past is enough to belie the assumption that means of livelihood cannot keep pace with rise in population.

In 1880, the population of Germany was 45 million, and due to the paucity of means of livelihood a near starvation stage had been reached in certain parts of the country, with the result that thousands of Germans were leaving their homeland. But then within the next 34 years, although the German population rose up to 68 million, as a result of economic transformation of the society, instead of any decrease in the economic position, their production multiplied manifold, and in certain cases hundred-fold. Consequently, it suffered from dearth in manpower and in order to keep their economic machinery running they encouraged immigrants from foreign countries. By 1900, there were 0.8 million foreigners working in Germany and in 1910 the figure rose to 1.3 million.

Phenomenal progress has occurred in West Germany after World War II. In addition to the natural rise in population, about 12.5 million refugees from East Germany, Poland, Czechoslovakia and other Communist dominated countries have migrated to it and their number is increasing everyday. The total area of the country is only 95 thousand square miles and its population has shot up to over 52 million, one man out of every five being a refugee. A large number of people, over 6.5 million, is getting pension because they are old or disabled. In spite of all this, West Germany is taking long strides along the road to economic growth and prosperity. Its national income is now greater than the national income of United Germany of Per-War era. Germany has no problem of excess population, rather, it is facing shortage of labor and hundreds of thousands of workers are pouring in it from adjoining countries.

Take the case of Holland. In the eighteenth century its population was hardly one million. Bu 1950, the country showed remarkable progress and development; and within 150 years its population rose to 10 million. This huge population is living within an area of 12,850 square miles the livable land. However, the people are not only getting all that they require, they even export their surplus food in huge quantities. They have pushed the ocean back and after cleaning the marshes have already reclaimed about two hundred thousand acres of land and are endeavoring to further reclaim an additional three hundred thousand acres, the wealth and well being of these ten million people has no comparison to the shabby state of subsistence in which they found themselves some hundred and fifty years ago when they were only one million.

England furnishes yet another example in this regard. In 1789, the total population of Britain and Ireland was 12 million. But in 1913 it rose to 46 million. And today even after the secession of south Ireland, its population is over 52.6 million. And who could claim that this five-fold increase in the British population has in any way made them poorer or that their standard of living has gone any lower.

Lastly, have a look at the situation obtaining in the world as a whole. Whole spectacle it presents! Since about the end of the eighteenth century, world population registered an extraordinary rise. But up to the present moment, along with the rise in population the economic resources and means of production have increased at much too faster rate. Today an average man is enjoying things which about two hundred years hack were only the luxuries of the few, and many of which even the kings and aristocrats could not get. The standard of living that prevailed two hundred years ago stands in no comparison with that obtaining in the present time. If this is so, what is the cause for pessimism.

Population Rise Not a Problem

1. The instances given above make it abundantly clear that in order to maintain a proper balance between population and economic resources it would be absolutely wrong to decrease the population or put a stop to its rise. Such attempts, instead of maintaining any equilibrium, may result in further deterioration of the situation. The proper course in this

regard is to try to increase means of livelihood and tap newer resources. This is the proper strategy for the future, and whenever it has been followed in the past, not only that obtained a proper balance, but means of subsistence and standards of living rose at a much faster rate as compared to rise in population.

So far we have discussed only those aspects of the question that had a bearing on the economic problem: matters directly related to the inexhaustible resources that the Creator—or, nature, in the terminology of atheists—has provided for mankind. Now we propose to study the population question itself and its growth so that we may correctly comprehend whether or not its planning is possible.

The Real Population Planning

1. Man is not born in this world because of his own will and planning. As the position stands, he has no choice in the matter. What we know on the basis of scientific studies in our own times shows that in a single intercourse man emits from 220 million to 300 million spermatozoa, while some scientists estimate it to be 500 million. Each one of these spermatozoa is imbued with full potentialities of becoming a human being, provided it is able to fertilize a woman's ovum or egg-cell. Each has the finest blending of the hereditary traits and the individual characteristics of its own, which can shape a distinct personality. On the other hand, ovary of an adult woman has about four hundred thousand unfertile eggs in it. But out of these, only one egg comes out once in a 28 day cycle, usually 14 days before the onset of menstruation and it remains fully prepared, at the most for 24 hours, to be fertilized by man's spermatozoa for the conception to take place. From the age of 12 to 48, a period of 36 years, a woman's overy discharges 430 eggs on an average which could be fertilized. All of those eggs too contain the finest blending of the hereditary traits from the mother's side and the individual characteristics pertaining to that woman, and thus producing a personality quite distinct. Now what happens is that on the occasion of every intercourse tens of millions of spermatozoa race out in search of egg-cells of woman but either there is no egg-cell available at that time or all the spermatozoa fail to reach it. Similarly at each cycle one egg-cell comes out of the ovary of woman at a particular time and awaits for the spermatozoa at the most for a day and night. But during this period

either no intercourse takes place or no spermatozoa is able to reach the egg-cell. Thus dozens of occasions and some time entire life of a couple is passed without a fruitful intercourse, Billions of spermatozoa and hundreds of egg-cells go waste. It is just a particular moment when a spermatozoa could made an egg lrtile and the woman can conceive.

This, then, is the system that gives birth to man. Even a cursory glance over this svstent should be quite enough to show how far our own planning can have any say in it. No mother, no father, no doctor, and no Government can in the least determine as to which of the intercourse of couple can bear a child. Who possesses the authority and control by which a particular spermatozoa out of the billions a man emits, and only one egg-cell from amongst the hundreds that woman has ready for the purpose, could be joined with each other and decide as to what sort of a personality to develop out of the combination of the two. Taking decision is a far off matter, a woman even doesn't know when conception actually took place in her womb and what sort of human being she is going to give birth to. She is in complete dark as to his characteristics and traits, his intellectual powers and capabilities. All this is being regulated by One Who is above all and nmning the entire machinemy of birth and creation according to His own plan without the least possibility of any interference from any quarter, And He determines the exact moment of conception. He sel ects the particular spermatozoa and the egg-cell which have to be combined. It is He Who decides whether a boy should be born or a girl, or whether he or she should be ugly or pretty, genius or stupid, able-bodied or incapacitated. In the scheme of things the only function man and woman are required to perform is that man and woman meet with each other in fulfilment of their natural desires and thus at best try to initiate the machinery of procreation. Everything else is in the hands of the Creator Himself, Who has bidden them to act as agents in this great plan.

The real planning of human population is being done through this very system of procreation. Should we not reflect on this unique arrangement? On the one hand human male has been endowed with such a tremendous procreative potentiality that, the spermatozoa of just one man emitted out on one occas ion is enough to produce a population many times larger than that of Pakistan, but on the other, some Athourity higher above has so limited this tremendous procreative capacity that since the dawn of life till today human race spread all over the world could multiply only up to 3 billion. Let us do some simple calculations. If the offspring of only one couple had been given chance to go on multiplying their race on natural pace since three thousand years before Christ, and the population had doubled itself after every 30 or 35 years, we would have needed 26 digits to count the number of children produced by just that one couple. The question arises : if human species could multiply at such a terrific rate whose plan if not God's, has kept it under control and within certain limits. The fact is that He, according to His supreme plan, has brought man into this world and He alone decides how many men at a particular time are needed and with what rate to increase or decrease the progeny of Adam. It is God alone who decides about every individual, man or woman, what shape or appearance, what abilities and capabilities, what powers and aptitudes, each should be born with. Also, under what circumstances and conditions of lilt he has to he reared up and what amount of work he has to perform here. God alone decides what type of men should be born in a country, at a particular time. He determines the measure of rise and fall of a people. In fact, our imagination fails to hilly grasp I us planning, and we are certainly not in a position to block or hinder the operation of any part of 1-us scheme and plan. If we try to poke our nose it is not going to be fruitful because we, with our limitations, are not in a position to fully comprehend even that which seems to be apparent and visible ; much less we could grasp the hidden sides of things, so that we may make some plan after learning all the relevant facts of the case.

All this discussion cannot be dismissed merely as 'an expression of religiosity'. These are solid facts and offer solid ground for thinking to all people of sound reason. There may be a few who may say: after all what harm would there be if we plan our population in keeping with our own economic resources, especially when we have enough knowledge and technical ability to exercise control over the rise and fall of the population. We, therefore, propose to deal with this question too and shall try to refer to some of the consequences that may follow in the wake of any interfrence in the natural process of procreation and growth of population, - and what has happened in the countries which took to this kind of bold interference in nature's scheme amply vindicates our point.

Why Family and Not Population Planning

1. Whatever is said in support of family planning on econ omic grounds, on deep reflection, one is bound to feel that he does not lend any support to family planning but would logically call for populalion planning. In other words, the logical demand of their argument is that we should first make an exact calculation of the economic resources and means of livelihood and then, in view of these estimates, decide what should be the total desirable population, and also the rate at which newcomers should replace the dead. But such a planning is not at all possible unless the institution of marriage and family are totally done away with and all the men and women are assumed to be labour force under the thumb of an official Planning Commission which would arrange the 'copulation' of male and female 'labour' according to a fixed programme and plan,—short period as well as prospective plan,—for production purposes as a part of their official duty, and then order their separation after a desired quota of conception has been reached; almost on similar lines as production of food would take place in a comp letely socialised economy. There may be yet another way to make this total planning a success. All direct intercourse between men and women may be made unlawful and on the pattern of blood banks, semen banks' may be established and, as is done in the case of cows, mares and buffaloes, women too may be impregnated through artificial insemination according to previously fixed quota. These are the two methods which can logically fulfil the demands of population planning'— family planning is not the way to that end. There is no other way to keep balance between population and economic resources of a country.

Since man has so far not stooped to this level and is not prepared to accept this depravity, resort is made to family planning' instead of 'population planning' as a sort of compromise. The underlying idea is that the children may be produced in independent small factories called "homes", plan the administration of them may continue to he held in the hands of fathers and mothers, hut these independent factory- owners may some-how be presuaded to reduce production and conform, as much as they can, to the needs of overall planning.

Paving the Way for Family Planning

1. To achieve the aforesaid object there could only be two methods and both are being employed. First to appeal to the people in the name of their personal interest, and through incessant propaganda overwhelming their minds with the idea that by producing more children they will reduce their own standard of living. It is, therefore, imperative for the future well-being of their children and their own comfortable living that they produce as little as possible. This sort of appeal to their self-interests is children essential for the reason that free individuals cannot be induced to voluntarily adopt measures curtailing their personal liberty and discretion for this type of social planning—for the alleged economic purposes of the society. To carry them over, their selfishness is to be played up and an appeal has to be made in the name of their individual comfort.

   The other measure is to organise vast publicity to familiarize the people at large with the techniques and methods of birth control and to make the contraceptives—the whole legion of them, available to the common man and suggest to them that men and women may continue to safely enjoy each other without shouldering the responsibilities that conception entails.

Consequences and Results

1. We shall now briefly sum up the consequences and results that follow the adoption of these two methods in pursuing a national policy of birth control.

   (i) Scarcity of Manpower: This programme of family planning miserably fails to achieve the objective in view. After all, planning is said to be essential to maintain a balance between the economic resources and the population i.e., keeping in view the resources of the country, the birth rate is so manipulated that a particular standard of population could be maintained. But if a family has to decide for itself how many children to produce they will not and cannot always keep the interest of the country above their own comfort and standard of living, and all the more so in a society where sensualism and pleasure-seeking are on the increase and where moral values are giving way to the values of hedonism. Who can guarantee in such situation that they would necessarily go on producing children exactly in keeping with the requirements of the nation and the country and what can be expected in such a situation? What actually happens in such a situation is that the quest for their personal comforts and unsatiable urge for 'good things of life' will directly result in lesser and lesser children, with the consequence that instead of any increase in population, or the maintenance of population at an even level, there will be a constant downward trend.

That it must happen is not a mere conjecture. The example of France is before us. Of all the countries of the world this was the country which pioneered to make an experiment in birth control on a nationwide scale. The idea of birth control became popular there from the beginning of nineteenth century, and within a period of one hundred years the birth rate fell markedly below the death rate in most parts of the country. From 1890 to 1911 seven out of these twenty-one years birth rate remained so low that deaths outstripped birth by l,68,000.In comparison to 1911, the population of France in 1921 was lower by 2.1 million. In 1932 out of 90 departments of France only 12 had a birth rate which was slightly higher than death rate and by 1933 this number was reduced to six only. In other words, in 84 departments out of 90 birth-rate was lower than the death-rate. France suffered heavily for the folly and the humiliating defeats she suffered in the two World Wars reduced all her grandeur and power of the past. Birth control and decline in population were factors which inter alia contributed towards the eclipse of this world power.

Here arises a question that must be faced squarely. Could a country like Pakistan afford to take the risk whose 100 million people find themselves surrounded by a population of 1300 million belonging to four countries with some of whom relations are not cordial, may that be due to our own disputes with them or the ones caused by other international factors and forces.

(ii) Moral Degeneration: An appeal made to the people in the name of their own self-interest and ease and comfort in life, to produce less children shall not remain confined just to that particular aspect only.

It must naturally force people to think that the greater part of their income should be spent over their own needs only. This generates love for ease and luxury. If a feeling is developed that the non-earning members of the family are a burden, a cause of pulling down the standard of living of the earning members, they will most obviously be inclined to regard them as loathsome. If this mentality is allowed to persist, it may well be expected that not only their newly born offspring will he regarded as a headache but even the aged parents, orphan brothers and sisters, patients having no hope of recovery, and such other relatives who are disabled and are not in a position to earn their livelihood will be treated as undue burden on the society. In short, anyone who is forced to depend upon them and thereby bring down their standard of living will become an unbearable burden to them. Quite naturally, a person who is not prepared to shoulder the responsibility of bring up his own children cannot be expected to bear the burden of others who after all deserve lesser regard and attention. Thus this movement is bound to corrode the very foundations of our moral life. It will turn them greedy and selfish and will banish from their hearts all sense of sacrifice and dedication, of love and compassion, of sympathy and service.

This, too is not a mere theoretical apprehension, but a fact which compels recognition on all hands. The societies wherein this sort of approach was inculcated present a dismal state of affairs and bear testimony to this apprehension. We know what treatment is being meted out to the old parents in the Western countries, and similarly, how they behave with their brother. sisters and near relatives when misfortune overtakes them.

(iii) Promiscuity and Licentiousness: With the popularisation of this movement and with bringing its techniques within easy reach of everyone who could give the assurance that only married couples would take advantage of it and not the unmarried "friends"? It would, certainly, lead to illegitimate sex relation on a scale unprecedented in the history of our society. Our social conditions are already going form bad to worse. Our educational system is being systematically deprived of all emphasis for developing moral sense. Cheap amusements, sensuous songs and music, obscene pronographic literature, near-nude pictures have become a common

> feature of our social scene. Co-edudation, employment of women in offices, mixed social gatherings, immodest female dresses, beauty parades, are now a common feature of our social life and culture. Legal hindrance have been placed in the way of marriage and on having more than one wife, but there is no bar on keeping mistresses and having illicit relationships, prior to the age of marriage. In such a society perhaps the last obstacle that may keep a woman from surrendering to a man's advances is fear of an illegitimate conception. Remove this obstacle too and provide assurance to women with weak character that they can safely surrender to their male friends and you will see that the society will be plagued by the tide of moral licentiousness. All the forces that make society a cesspool of corruption are being encouraged and peddled. If we choose to walk along the road to destruction, how could destruction be avoided.

This, again, is what has happened in the West. In whatever country birth control has been practiced on large scale illicit sex relationships have become rampant.

These three are the inescapable consequences of making family planning a popular movement and a national policy.

National Movement or Individual Expediency

1. A clarification, however, is necessary at this stage. We must distinguish between a national movement of birth control and a limited birth control on individual basis, due to purely personal and specific reasons. The social harms which we have pointed out cannot raise their head and imperil the society if birth control is not made a national policy and resort to it is confined only to particular circumstances, where a married couple feels the necessity for its personal reasons and a God-fearing alim (scholar)' well-versed in Islamic knowledge after carefully considering the couple's circumstances, permits him to use the measures and, further, only if a qualified doctor advises the thing and supervises it. This limited individual birth control is something quite different from a popular movement for family planning where birth control is popularized on a vast scale in the general public and for which contraceptives are made available to the common man. In the latter case,

the consequences pointed out above cannot be checked by any power in the world.

The Islamic Standpoint

1. Now we would like to briefly state what the natural religion of mankind—Islam- has to say on this subject. Generally the protagonists of birth control bring in their support some sayings of Prophet Muhammad (peace be upon him) about coitus interruptus. But they conveniently forget that this piece of advice was administered by the Prophet (peace by upon him) to some individuals who on various occasions, compelled by their specific personal circumstances, wanted to understand as to whether it was permissible for the Muslims. Many who enquired about its permissibility from the Prophet got the reply in the negative, to some the Prophet remarked that it was undesirable and in some cases either he kept quiet or gave assent. Out of these various replies that were given specifically for the individual cases concerned, keeping in view their special circumstances and requirement, even if we take only those replies that affirm or permit it, the permission is for particular individual cases only. There is no justification on their basis to claim that Islam approves a popular movement of birth control. And we have seen that there is a world of difference between its adoption in individual plane in a private situation and a popular movement to make it a national policy. To ignore the difference between the two and making the one permissible on the false analogy of the other is unjustified on every canon of reasoning.

   As far as the question of a full-fledged movement directed to limit or stop procreation is concerned, its whole scheme—its basic idea, its method and means, its practical consequences, all are repugnant to the nature of Islam. What else is its basic idea than the apprehension that with the rise of population means of subsistence will fall short and life will not be easy to support. But the Qur’an regards this attitude of mind as wrong, misconceived, and unfounded. It tries to repeatedly inculcate in man that it is the Creator alone who provides food and sustenance. He is not engaged in creating without any scheme and program unmindful whether the earth can sustain His creatures. Neither He has delegated this responsibility to someone else; as if creation is His responsibility and provision for the means of livelihood rests with the hands of someone else. He is not merely the Creator. He is the Provider as well, and He

Himself knows best what His responsibilities are. This theme has been so thoroughly dealt with in the Qur'an that to cite all the relevant verses will be a lengthy task. Hence we shall refer to only a few of them:

> "And how many a living creature that does not carry its sustenance: Allah sustains it and yourselves."
>
> "And there is no animal in the earth but on Allah is the Sustenance of it."
>
> "Surely Allah is the Bestower of sustenance, the Lord of Power, the Strong."
>
> "His are the treasures of the heavens and the earth; He makes ample and straitens the means of subsistence for whom He pleases."
>
> "And We have made in it (the earth) means of subsistence for you and for those others for whom you the nourisher. And there is not a thing but with Us are the treasures of it, and We do not send it down but in a known measure."

After stating these facts of life, the Qur'an explains that it is now for man to seek and procure his means of livelihood from out of the vast treasures scattered all over the earth and within it. In other words, God has made the provision and it is the responsibility of man to search for it and play his part therein.

> "Therefore seek the sustenance from Allah and serve Him and be grateful to Him: to Him you shall be brought back."

Another aspect that deserves to be noted is that the Qur'an deplores the attitude of those persons and tribes who in the pagan days used to kill their children for fear of lack of food:

> "And do not slay your children for (fear of) poverty- We provide it you and shall as well provide for them."
>
> "And do not kill your children for fear of poverty; We shall give them sustenance and yourselves too."

In these verses admonition is not for one but for two things: First, they used to kill their offspring and this is forbidden. Second, they used to regard children as a source of their poverty. Hence their second misconception has been removed by saying why at all they regard themselves to be the provider for their offspfing. Only He provides food for them and as well as for their children. And so if infanticide is not committed to stop growth of population, yet such other means are adopted which may not permit conception to take place, it would at most be avoiding the first mistake. The second misconception, the explicit reason which motivated them for one form of crime, shall still persist. If the fear of scarcity of resources and of food, as a motive for stopping procreation, assumes a new form and if this behaviour is motivated by this reason which the Qur'an has strictly forbidden, even the change of form would not take the stink out of the situation, the Qur'an strikes at this mentality and does not want this to persist. This is what the Qur'an has to say about the attitude of mind that has given birth to the idea of limiting the population, may be in our era or in any other period of history.

Now we would like to make a final submission. Look at the consequences that will inevitably follow if this idea is given the form of a social movement, and then try to realize whether Islam can tolerate any of the consequences that are bound to follow. Could anyone expect that Islam, which regards promiscuity as the gravest of moral crimes, and for which it prescribes the most severe of all punishment is tolerant towards the evil of promiscuity and illicit sex. In the presence of a scheme of life that encourages feelings of compassion, love and sympathy, can it ever evince any complacency towards a root- force that produces selfishness and greed, a mentality which must gain ground along with any nationwide publicity and campaign for birth control and then, how a socio-political power—Islam--- which cared for the safety and security of the Ummah could tolerate a movement which is bound to result in further reducing the number of Muslims-already too little—specially when surrounded by hostile forces all around. These aspects are so explicit, so unequivocal and so self-evident that little commonsense is sufficient to appreciate their significance and to see that Islam can never sanction such a policy of race-destruction. There is hardly any need of quoting any more from the Qur,an and the Sunnah. The incompatibility of the two is manifest beyond doubt and such a thing of so high must not be ignored.

CHAPTER 15

MAINTENACE OF THE MUSLIM DIVORCED WOMEN, WHAT LIES BEHIND THE MISUNDERSTANDING?

I. The pre—Islamic scene of the history displays the worst possible image of woman's destitution and helplessness. In Europe as well as in the pre—Islamic Arabia she was deprived of legal recognition as an independent being and was not more than a rightless duty—bound creature. The provisions provided to the wife were only in lieu of economic gains that were being derived from her and it was a kind of ration given to a prisoner, or fodder given to a beast of burden. Because of promiscuous sexual relations in pre-Islamic Arabia loose and temporary marriages were common, as a result of which woman had no right to maintenance in the legal sense of the term. Woman had no *locus standi* in the eye of law and man had adopted various means to evade his obligations towards women.

II. In India we are yet surrounded with the survival of the rudiments of primitive society where consanguinity is determined through females who head the family as a polyandrous wives. It is so amongst the Nairs of Malabar and among some other tribes in northern India. Generally, the early family life, and customs have remained the main governing norms in mutual relations. Because of the concept of the merger of wife's personality into that of husband on marriage, the wife had no legal rights against husband and therefore, the maintenance as a legal right in the technical sense of the term was nonexistent. In the non-Aryan family which consisted only of the wife, husband and their unmarried children, the ownership of the matrimonial property was shared by the spouses, while, as in the Aryan joint family, as a dependant, the wife was to be provided with the provisions for sustenance from the joint estate.

In practice gross deviations from the injunctions of the religious texts were common and women occupied a subordinate position to men to such an extent that they were not allowed even to live after their husband's death but to burn themselves to death alongwith the dead body of the husband.

III. Islam came as the real benefactor of humanity and protector of the oppressed. Islam provides an efficient legal framework for the protection of women right from the womb of the mother upto the grave against her exploitation and misuse. The legal personality of woman is recognised both before and after marriage and she can get her legal rights enforced against the strangers as well as against her husband. Islam closes the doors of promiscuous sexual relations and creates an atmosphere of chastity and stable family relations. For the achievement of this lofty objective Islam defines the mutual rights and obligations of the marital parties and confers upon the female partner the right to claim maintenance from the husband. The right liberates women from economic strains and dependence upon any body other than her husband which is indispensable for the protection of womanhood and for the home to be a place of tranquility. In contradiction to this, in Europe, after thirteen centuries of the Islamic revolution, the woman was sought to be removed from the list of indented persons. The motive behind this historical change was not the humanitarian aspect or Divine and fair sense of justice as in the case of Islamic revolution, but it was because of the profit motive which after industrial revolution brought European woman out of the dignity of house into the serfdom of shop.

IV. In India, after the Muslim conquest, the Muslim population went on increasing and Sharia began to be followed simultaneously The early Muslim rulers mostly concentrated upon their political dominance in India and no statisfactory implementation of Sharia is in evidence upto the beginning of the Mughal period. During Mughal period the Islamic law occupied the position of the law of the land and the well known work on Islamic fiqh 'Fatawai-Alamgirj' was compiled, under the patronage of Emperor Aurangzcb Alamgir ,to facilitate the implemetatjon of Sharia. During foreign British rule, although the Islamic law was dethroned from its position of the law of the land, it was retained as the rule of decision in family matters including maintenance as is evidenced by the judicial decisions before independence. Shariat Act of 1937 also expressly lays down that maintenance claims would be decided according to Sharia where the parties are Muslims.

V. When the Code of Criminal Procedure was first enacted in 1898 provisions were incorporated in it regarding the maintenance of women. Under the said provisions Magistrates had been empowered to order a husband to make monthly payments to the wife for her living where he neglects or fails to do so. This law, with some amendments from time to time, is still applicable to all Indian wives. This marked the beginning of the secularisation of maintenance law in India.

VI. Islamic Law on the subject of maintenance is not wanting; it is very elaborate and complete in itself. Circumstances have been clearly defined as to when maintenance is to be allowed or disallowed. Islamic Law makes it incumbent on the husband to maintain his wife. In marital relationship man is free from certain pangs reserved by nature for woman. It is the woman who is subjected to mansturation, burden of pregnancy and indispositions peculiar to it, the pains of child birth and the onerous responibility of bringing up the the utterly powerless offspring in order to develop the next generation are only for the woman. It is the husband who should, therefore, in all fairness, bear the responsibility to support the woman as properly as required by the Islamic Law.

VII. In reality, Islamic law does not seek to devise a law in favour of women and against men. It is a very well-balanced law wherein rights and duties are well defined in accordance with their natural mould and capacity of man and woman. Where a wife fails to perform her part of duties, the husband is not legally bound to maintain her as in case of refractory and disobedient wives. But where the wife fails to do so for some justifiable reason, she does not lose her maintenance right. Elaborate rules have been laid down to decide the claims of wives in cases of illness, disertion by or absence of husband and many other circumstances that are likely to arise. Wives are also free to secure themselves more benefits and rights including that for maintenance through agreement at the time of marriage.

VIII. About the consequences of non-maintenance two opinions have been put forward by Muslim jurists. Hanafi jurists support the view that the marriage is not to be dissolved for non-maintenance but the wife be allowed to raise loan at the husband's credit, or the husband be forced to provide maintenance to his wife by compulsion through imprisonment. The jurists of the other schools, however, support the dissolution of the marriage when the husband is unable or fails to maintain his wife. The contemporary ulama of the Hanafi School recommend the separation of the parties in cases of extreme hardship because of the impracticalbility of loans against the husband's credit.

IX. In India, before 1939, the Hanafi doctrine was the general rule but in that year the Dissolution of Muslim Marriages Act was passed which embodies provisions empowering the Court to dissolve the marriage when the husband neglects or fails to maintain his wife for a period of two years. Juristic opinions greatly differ as to the question whether the failure to maintain the wife is wilful or otherwise in order to entitle a wife to a decree of *faskh.* The provisions of the local Act of Jammu and Kashmir clearly lay down that the failure of the husband must be wilful which appears to bea reasonable law.

X. In India, as the personal laws relating to maintenance are supplemented by the provisions of the Criminal Procedure Code, the wives may get their rights under either of the two laws. The 11 provisions under the old Code were not, in principle, different from those of Islamic law, but the judicial interpretation has revealed some conflicts between the two laws. Under the new Code of 1973 some significant changes have been incorporated which entitle only : 'such woman to claim maintenance under the Code who is unable to maintain herself and a divorced woman is also given the right to maintenance against her erstwhile husband However, the uncertain interpretations of the procedural law have marred the purpose ofmaking available speedy remedy to the destitute.

The Solutions which Islam offers

Maintenance being an indispensable institution needs to be made more efficient and workable. Following suggestions are made which may prove helpful for the guidance of the legislature and the Courts.

In view of the secularisation of the maintenance law, maintenance claims are agitated under the secular law. But the Courts have failed to give satisfactory constructions to the provisions of the secular Code. A Muslim wife has been deprived of the right of maintenance if she refuses to keep company with her husband for the non-payment of prompt dower. True that the right to maintenance under the Code is a statutory right, independent of the personal law, but does it mean that the terms under the secular Code should necessarily be given such connotations which contradict the canons of Islamic law? What else can be a more sufficient and just reason to refuse company of the husband than the non-payment of her dower, a token of her respect, as agreed by the husband at the time of marriage? Same is the case with other conditions under the Code. It is suggested that the provisions of the Code are to be interpreted in consonance with the spirit of the Islamic law because no "expressions" or "phrases" can derive their connotation from vacuum but these have to be defined and explained with reference to some special values, public opinion and the like.

II. As the nature of marriage for the purposes of Section 488 of the old Code. (S. 125 of the new Code) has to be determined under the personal law of the parties, there is no reason to refuse to give equal weight to all matters incidental to marriage also under the personal law.

III. No doubt, a wife should not lose her right to separate maintenance if she refuses to live with her husband when he has contracted second marriage, but the Courts have allowed separate maintenance to such wives even when they refuses to preform conjugal obligations in toto. Islamic law on the point is undoubtedly more reasonable as it allows a wife to claim a separate house, or at least a separate apartment, and also a servant, but to keep no other impediments between herself and the husband. Therefore, the principles of Islamic law is more appropriate to be adopted in this respect.

IV. It is expressly laid down in Section 125 of the new Code that a wife cannot claim maintenance from her husband when they are living separately by mutual consent. This provision is unnecessary and adds to the confusion that is already found in this law. Courts have unnecessarily been made to face the questions whether a divorced wife can be held to be living separately by mutual consent. Again, when the spouses mutually agree to live separate there is no reason to suspend their other rights and obligations. This provision should, therefore, be repealed.

V. Under the new code only such wife can claim maintenance who is unable to maintain herself. This provision creates some interpretative problems. Can a wife be said to be able to maintain herself when she has no property but has a good and healthy physique and is capable to earn? Under the present circumstances of less job opportunities it is difficult to take such a view. Keeping in view the nature of woman and her peculiar domestic obligations she is not to he burdened with the additional duty of contributing to the family budget. Islamic law takes into consideration all these factors and casts an absolute duty on the husband to maintain her which really is reasonable and worth following.

VI. Section 127(3)(b) of the new Code providesprotection to the Muslin' personal law in determining the period of maintenance for a divorced Muslim woman. Bai Tahira and other cases have encroached upon the permises of Islamic law of maintenance. These cases, *inter alia,* mean that a person has to maintain his divorced wife till her death or re-marriage notwithstanding the fact that he has already made all payments required under the Islamic law consequent upon a divorce. It also amounts to saying that a man will have to pay maintenance to his divorced wife, even though it is she who is responsible for the dissolution of marriage. Normally, no one is allowed by law to take benefit of one's own wrong but this principle has been given a go-by in the decisions in these cases. It is necessary, therefore, that the wording of Section 127(3) be altered to remove all scope for any doubt about its applicability in case of divorced Muslim women for the purpose of determining the period of maintenance.

VII. The only way which can secure the simultaneous harmonisation of the Islamic law and the secular Code is that Section 127(3)(b) is to be construed as proviso to Explanation (b) to Section 125(1).

VIII. Keeping the above suggestions in view, it is, therefore, in the fitness of things that an amendment is made in the new code whereby the provisions of the Islamic law of maintenance with their pristine purity are brought into the body of law. A dispassionate study of Islamic law of maintenance establishes it beyond doubt that this law is complete in itself, just and consonant with the demands of the present time. It manifests Divine wisdom and is perfectly a balanced law.

Divorce and Separation Laws in the West

"Things are distinguished through their opposite," is a popular saying. The Foregoing pages have given details of the Islamic marital law. However, the beauty of this law cannot be fully appreciated without a comparative study of other marital laws of the world, which claim to be progressive. The study will also show what blunders are made by man when he ignores Allah's guidance and becomes his own law-maker.

An important characteristic of the Islamic law is its extreme concern for moderation and balance in its principles and basic mandates. On the one hand it is guided by a lofty moral ideal, and on the other it makes due allowance for human weaknesses. On one hand it seeks to promote the cultural and national welfare, it protects the rights of the individual on the other. It keeps its gazw fixed on factual conditions but dose not lose sight of possibilities that might develop any time into realities. In fine, it is such a moderate law that does not allow any of its principles and mandates to overdo or to fall short. Islam gives full consideration to all the necessary aspects of law-making, theoretically as well as practically. The balance between its various aspects is so accurate that no undue leaning toward one side or an unjust neglect of the other side can be cited. That explains the secret of its success over a span of fourteen centuries, in different times, in different cultural environments and with peoples of different intellectual levels and varied temperaments. No individual or collective experiment has found any of its basic mandates wrong or needing an amendment. Not only this. The human mind, despite all its efforts, has been unable to suggest for this law a substitute which, in moderation and balance, could even partially match it.

This quality of the Islamic law can only be the product of Divine wisdom and insight. Because of his inevitable handicap and natural limitations, man can never have the power to encompass all aspects of the problem or take an equally searching look both at the present and the future. Nor can he simultaneously take a look at the actual and potential or make a probe into the apparent and the hidden traits of his own self, or of mankind. He cannot fully rise above the influence of his environments, his passions, his physical aptitudes, his mental handicaps and scholastic shortcomings. So, he is incapable of making a rule which can hold good, with all fairness and balance, in all circumstances, at all times and for all needs. That is why all manmade laws lack balance; the theoretical aspect may set over-emphasis, or the various aspects of human nature may not get due attention. The rights and duties and limitations of the individual and society may be unjustly demarcated. The failings of manmade laws get exposed in every new experiment, with the changing circumstances and changing times. This forces man either to amend the laws or to indulge in rhetoric and evade th concrete facts of practical life.

This basic difference between the Divine law and man-made law today stands exposed beyond doubt. Some principles of Islamic law which were under bitter attack till recently because of prejudice and ignorance, and some theories and rules of man-made laws were extolled to counter the Islamic principles, the testimony of actual facts proves irrefutablly today that Islam's verdict is infallible. As against this all manmade laws turned out to be wrong and impracticable. In the imaginary world they dazzled the eye, and even today they are not openly disowned, but in practice, people are violating these laws, which till recently were looked upon as sacrosanct and beyond amendment. The world is slowly swinging towards the principles and rules prescribed by Islam, but only after a very bitter experience.

Take, for example, the problem of divorce. Till very recently, the Christian world has been ridiculing Muslims on this issue. Appologetic Muslims failed to provide any answer. However, facts have proved that it was not wise on the part of Christianity to make the sacred tie of marriage unbreakable, and make no provision in the law for divorce, khula, dissolution of marriage and separation. This error was the product of immoderation of the human mind. Instead of promoting morality, humaneness and social welfare, the Christian marital law started breeding forces of disruption.

'Let man not pull apart those whom God has joined."[354]

---

[354] Mathew 6:19.

The Christian world misinterpreted this sage advice of Christ. In place of making it a basic of moral guidance, it was made the basic principle of the marital law. And what the outcome? For centuries the Christian world remained clung to this impracticable law, violating it under various pretexts and tricks. Ultimately, the evil habit of law-breaking grew so strong that the moral scruples, that were more sacred than the marriage bond, began to be violated openly and quite frequently. At last, people felt compelled to make some faulty amendments in the law which had been mistaken for a Divine law. But by the time this reform was made, the habit of law-breaking had taken such from roots in the Christian mind that it had lost all faulty amendments in the marital law triggered off a spate of divorces, dissolutions and separations in the Christian world. And such was its intensity that the sacred institution of the family has been threatened. In England there were just 166 separations in 1871. In 1933 the number soared above four thousand. It meant that out of every 79 couples united by God, one had been separated by man. In the U.S.A. there were 35 thousand separations in 1886. In 1931 the number of sacred ties torn asunder has risen to over 183 thousand. Almost the same situation prevails in other Western countries.

The advice given by Christ has a parallel in the Qur'an too:

> "Those who break the covenant of Allah after ratifying it, and tear apart what Allah has commanded to be joined, and who make mischief in they earth, the are the ones who are losers."[355]

To warn the Jews against their hard-heartedness and their frequent resort to divorce, Jesus has to declare:

> Whoso divorces his wife for any reason other than adultery, and marries another wife, commits adultery.[356]

For the same reason, the Holy Prophet (peace be on him) declared divorce to be the most hateful of the permissible things. He also warned that the curse of Allah falls on the man who divorces only for the gratification of his lust.

However, these high moral ideals were meant only for men aspiring to moral heights; they were not meant to be transformed in to law. The Holy Prophet (peace be on him) was not only a teacher of morality but also a law-giver. So he enunciated moral laws and also explained the extent to which they should influence law so that balance may be maintained between morality and human nature. On the contrary, Jesus was not a law-giver. His mission in this world ended before he could enforce any law. So we find nothing in his sayings except the basic moral precepts. If these precepts were to be applied to practical problems of life, it could only be done in the light of the Mosaic law. But the Christians came to think, or were led to think by St: Paul, that the moral teachings of Jesus nullified the Mosaic law and the law-making was the business of the Church and not the business of God and His Messenger.

---

[355] 2:27.

[356] Mathew 9:19.

This was the colossal error that drove the Church and its followers into perpetual abyss. The two thousand year history of Christianity bears witness to fact that the Church never succeeded in making even a single sound law on the basis of the fundamental principles of the faith enunciated by Jesus. Al last Christian nations were forced to abandon these principles themselves.

In his denouncement of divorce, Jesus had made adultery a justifiable reason for it. This exception was a hint that divorce was not an absolutely evil thing. It was an evil in the absence of a legitimate cause. The Christians did not take the hint and some of them even came to look upon the exception as later addition. Their argument was that the exception contradicted the warning of Jesus: Let man not pull apart those whom God has joined. Some even deduced from this warning the fantastic conclusion that in the event of the wife's unfaithfulness, the spouses should be separated but the marriage tie should stay i.e. neither one of them should be free to have a second marriage. For centuries the Christians remained bound by this law. This law along with other laws, was responsible for the spread of immorality in the Christian world.

Advanced countries of the West now base their laws on rational principles, quite free from the influence of the Church. Interestingly, even in England and the United States, judicial separation means that the spouses should part company but should not be free to have a second marriage. Such is the manifestation of the failings of the human mind! The canon laws of the Roman Catholic Church were framed on the basis of the aforesaid principle. They totally ruled out divorce or the dissolution of marriage which could enable the spouses to remarry. However, six reasons for separation were proposed:

1. Adultery or Homosexuality
2. Impotency
3. Cruel treatment
4. Disbelief
5. Apostasy
6. Detection of some extra-legal blood relationship between spouses.

The legal remedy suggested in all these cases was that the spouses part company and live as celibates. No sane man can look upon this as asensible remedy. Actually, this was not a remedy but a punishment that deterred most of the people from taking separation cases to the court. If some unfortunate couple was separated, the spouses had either to spend their lives as monks and nuns or to submit to a life of sin.

To avoid this harsh and impracticable law the Christian clergy invented several legal tricks with which the church dissolved the marriage of miserable spouses. One of the tricks used was that the life-long promise of union made at the time of marriage should be declared to have been made unintentionally. The real intention was stated to be companionship only for a part of life. Under the cover of this excuse the marriage was annulled. That meant that their marriage never took place, their conjugal relationship thus far had been unlawful and the ensuing children as legitimate. So the remedy was more humiliating than the malady.

Compared to the Roman Catholic Church, the law made by the Orthodox Eastern Church, which had enjoyed more opportunities of contact with the Islamic Law, is a better and more practicable law. According to it the marriage tie can be dissolved on the following grounds:

1. Adultery.
2. Apostasy.
3. Dedication of life by the husband as monk.
4. Rebellion
5. Desertion.
6. Impotency
7. Madness.
8. Leprosy.
9. Long imprisonment.
10. Intense mutual hatred or incompatibility.

But this law is unacceptable to the Western countries. They believe in the rulings of the Roman Catholic Church, which categorically declares that nothing but death can break the marriage tie. This ruling leaves no room for independent thinking or even taking a critical look at another Christian school of thought. Speaking to the Royal Commission in 1912, Bishop Gore opposed the borrowing of some rulings from the Orthodox Eastern Church on the ground that the Anglican Church was a follower of the Roman Catholic jurisprudence. In the Lambeth Conference of 1930 it was unequivocally declared that the marriage of a man or a woman whose former spouse was still alive could not be solemnized.

The last reform that was accepted by joint committee of Convocation in 1935 was that a marriage could be dissolved if one of the spouses had been suffering from a venereal disease before marriage, or if the woman was pregnant at the time of marriage but concealed this from the husband. This implies that in case of any such contingency aris ing after marriage there is no way out for either one of the spouses.

This was the chaotic picture of the marital law of the followers of the faith which has given the world a long chain of scholars and jurists. However, its earliest leaders misinterpreted the meaning and legal implication of a saying of Jesus Christ. That fact left an indelible mark on the Christian faith and its jurisprudence. The march of centuries, changes in environments, the intellectual and mental evolution, the studies of human nature, centuries of experience, the clear verdicts of reason, the records of better legal systems, and, in short, the cumulative effect of all these factors has failed to erase the indelible mark on the Christian faith. Despite all their efforts spread over a millennium, the best minds of the Roman Catholic Church have not been able to give their law the right balance and moderation.

Now let us take a look at the achievements of the enlightened Western law-makers of vast learning and experience, who, unfettered by religious restraints, have framed laws for their people.

Before the French Revolution most of the European countries were in the grip of the law made by Roman Catholic Church. This law, combined with other laws of similar nature, had given birth to a host of moral and social evils. During the revolutionary period, free thought and free criticism gained momentum. Their first target was the sorry state of the law. Feeling that the clergy could, in no way, be persuaded to accept reform, people threw off the yoke of the Church. This took place in France in 1792. By and by the movement spread to other countries. England, Germany, Austria, Belgium, Holland, Sweden, Denmark, Switzerland, all turned their back on Church laws and framed their own marital laws. These laws provided for legal separation and dissolution of marriage and also for divorce.

This widespread revolt of Christian nations against the canon law was the direct result of the narrow- mindedness, ignorance and prejudice of the clergy. They insisted on oppressing the people, with their religious authority and impracticable, unnatural and harmful laws. The law was not Divine. It was the product of the independent judgment of the clergy. But the priests declared it sacrosanct and beyond amendment as though it were God-made. They simply refused to see or comprehend its glaring errors, harms and irrational aspects because they were scared of forfeiting their faith, even by a shadow of the possibility of ascribing error to the rulings of St. Paul and other giant figures of early Christianity. They were opposed even to borrowing useful elements from the jurisprudence of another Christian sect. The reason for this was not the superiority of their own law, but the fact that they were the followers of the Western Christianity. This unreasonable attitude of the clergy left no option for the Western nations except to break away from the canon law which was considered above reform, despite its apparent errors and harmfulness.

This mentality of the clergy was not just limited to the marital law. The truth is that it is this mentality that has driven European nations to atheism, secularism and hedonism.

Having got rid of the canon law, marital laws form- ulated by the Western countries over a century were the fruit of the best efforts of hundreds and thousands of minds. Again and again amendments have been made in these laws in the light of experiences. In spite of all this, their law lacks the balance and moderation of the law gifted to the world by the unschooled Prophet of Arabia (peace be on him). The strange thing is that even after doing away with the canon law, the people of the West have not been able to erase from their minds the concepts inherited from the early founders of the Roman Catholic Church.

Let us take the example of England. Before 1857, adultery and cruelty were the only two grounds on which legal separation could have been obtained. Divorce, freeing the spouses to remarry, was forbidden. In 1857, desertion or suspension of conjugal relations was also declared a ground for separation provided the desertion lasted two years or more. This law also legalized divorce, freeing the spouses to remarry. But the husband could not use the right of divorce on his own. He had to use it through the court. In the same way if the woman wanted divorce, she too had to have recourse to the court. But there was just one way of getting a degree of divorce. If the husband wanted to divorce, he had to prove the unfaithfulness of the wife. In case the wife wanted separation, she too was required to prove the man's unfaithfulness and cruelty or desertion. This provision of law forced men and women desiring to get a divorce to accuse the other spouse of unfaithfulness, no matter what the actual motives were. Proving allegations in the court, easily led to fabrications of charges and the undeserved defamation of innocent people. The court became the centre for washing dirty linen. The press reports of divorce cases amounted to the publicity of obscenity. The law permitted husbands, if they so wanted to receive damages from the paramours of their wives. Such damages, of course, amounted to the price for illicit relations with the wife.

In 1896 the court was given the power to make the erring husband pay alimony to his divorced wife. In 1907 the court was given unconditional power to make a husband liable for alimony to the divorced woman if it thought fit. Of course, this amounts to partiality toward women. It upsets the balance of the law. In the absence of any existing relationship, it is clearly unfair to burden a man with the living expenses of a woman on the basis of a previous relationship.

The law of 1895 declared that in case of a woman leaving her husband because of his cruelty and taking up separate residence, the court would debar the husband from visiting her. She would be entitled to alimony and to keep her children with her. The law also said that in case the cruelty and the negligence of a husband drove a woman into illicit relations, the man's plea against her for a divorce would not be admissible. The implications of the law are ridiculous. It boils down to this: A woman proves the cruelty of her husband, takes up separate residence along with her children, is free to receive paramours, and the husband is debarred from visiting her. All the same the poor man has to pay alimony to this merry-making wife and has no way of getting rid of her. This was the law framed by some of the best minds of England after half a century of labour.

A Royal commission was set up in 1910 to deliberate on the marital relations. The commission submitted its report at the end of 1912, after three years of deliberations. Some of its recommendations were:

1. The husband and the wife should be at par *vis-a-vis* the grounds for divorce. In other words, the grounds on which a man can be granted divorce should also be the ground for the woman to get a divorce. For example, adultery, even if committed just once by either one of them, should lead to a divorce.
   The following were added to the previous grounds for divorce:
2. Desertion for three years, ill-treatment, incurable madness for five years, hopeless drunkenness, punishment resulting from the commutation of the death sentence.
3. On the ground of drunkenness the spouses should be separated for three years. If the addiction still persisted, the aggrieved spouses should be entitled to a degree for divorce.
4. If one of the spouses is afflicted with madness or a venereal disease and the fact has been hidden from the other spouse or the woman is pregnant and has hidden the fact, it should be considered a sufficient ground for the dissolution of marriage.

5. Reports of divorce cases could not be published during their proceedings. Later the court may permit publication of only those parts of the proceedings which it deems fit.

Strangely enough, out of these proposals only the first one, which is perhaps the most irrelevant and uncalled for, was accepted and published in the Matrimonial Cases Act, 1923, and the rest have never been given legal shape or sanction simply because they did not find favour with the chief priest of the Canterbury and some other influential figures there. The bankruptcy of the mental faculties of the best brains of England reflects well in the fact that they were just unable to understand and distinguish the legal and natural aspects of adultery. The faulty system of law-making led to the manifold increase in cases of divorce claims from women which disturbingly alarmed the courts of England. As a result, Lord Merziville had to take strong preventive measures in 1928.

In European countries where the Roman Catholic Church is quite influential, the marriage bond is still considered unbreakable with the exception of only a few cases where the separation can take effect after legal proceedings but with the condition that the spouses will neither be able to reunite or have second marriages. The laws of Italy and Ireland are made according to this system. France has also passed through many ups and downs with regard to the marriage laws. The divorce has been made extremely easy and simple after the French Revolution. A few restrictions were promulgated under the Code of Napoleon which were totally banned in 1816 and could be restored in 1884. But several laws were enacted in 1886, 1907 and 1924 according to which following conditions were laid for granting divorce:

They were, adultery or fornication by any of the spouses, cruel behaviour, any objectionable act on the part of any one of the spouses which might tarnish the honour of the other, refusal by any one of the spouses to fulfill the marriage rights, drunkenness and punishment by the court which many cause dishonour.

Besides, the woman divorced by the court interference was also liable for 300-day iddat, waiting period, which was fake imitation of the Islamic ruling on the subject. The laws of divorce in other European countries are not in consonance with one another either. The only common factor among them are that they are faulty and unbalanced. The spouses in Austria, Belgium, Switzerland and Norway can secure divorce only after mutual consent and agreement. And this type of divorce is the faulty model of the Islamic way of divorce from woman, i.e., *khula*. In Germany, the separation of the spouses, or living apart without any reason, does not amount to invoking divorce as long as this separation continues for a year. This kind of separation is a faint reflection of Eila or leaving alone for a specified period. The waiting period for separation in Switzerland is three years and five years in Holland, while the marriage laws of other European countries are silent on this subject.

Sweden has fixed six years waiting period for the missing husband, and ten years in Holland, while other countries are still silent on this topic too. On madness of the husband, Germany, S'weden and Switzerland have granted three years each but other countries have given no legal ruling on this subject. While Belgium has granted ten months as waiting period for the divorced woman, arid apart from France and Belgium, no other country has fixed any waiting period for second marriage for the woman.

In Austria, five years of imprisonment of any one of the spouses is enough for claiming the divorce. But in Belgium the condition is life imprisonment for such a claim.

Such are the laws and rules of marriage and divorce among those nations of the world which are considered most civilized. A cursory glance at these legal systems indicate that none of these countries has been successful in devising complete, balanced and moderate legal system regarding the marriage bond. On the contrary, whoever looks dispassionately and honestly at the Islamic laws of marriage and divorce would agree and endorse the fact that the Islamic laws are on the pinnacle of uprightness, total balance, have consideration of man's nature, uphold safety of social system, with full control of the regulations of the various issues and problems relating to marital life. As against this, the laws of the Western countries, individually or collectively, come nowhere near the Islamic laws. Interestingly, the laws of the European countries were devised by the best of the brains of those countries in the nineteenth century, whereas the Islamic laws were formulated and devised by an unlettered and simple man, the Prophet (peace be upon him), who never consulted any parliament, legislature, law-making body, any commission or body of experts or legal luminaries for formulating or promulgating them. And if anybody, despite this prominent difference, challenges and dares to say that the Islamic laws are not made by God but purely manmade, we would opine that such a person should have proclaimed godhead for himself. But there can be no clearer proof of truthfulness of the Prophet than that he never took credit for the noble and miraculous achievement which is beyond even man's comprehension. Rather, he declared openly and repeatedly that he did not invent or present anything of his own; whatever he has presented to the world was given to him by God through Divine revelation. If a man continues to deny the necessity of Divine guidance and insists on being his own leader and torchbearer, stupidity is the most suitable term to describe him and the range of his intellectual capacity.

CHAPTER 16

ISLAMIC FIQH : AN OVERALL EVALUATION

Fiqh is an Arabic word which means 'to understand', and its technical meaning is "law" is explained in a beautifully subtle parable in the Qur'an: " The similitude of a good word is like a good tree whose root is firm and whose branches reach into heaven" (14:24). In other words, the source of law is a small seed but the tree which sprouts forth from it reaches the sky and its branches cover everything. This is exactly the case if we consider the Qur'an and the *Hadith* as the root or the seed. We shall see that the tree sprouting forth from it has become so strong, with all its sprawling branches, that it is able to meet all human requirements till the end of time. And it is obvious that branch by branch the tree keeps growing constantly. Its growth is neither stunted nor static.

It will be appropriate to begin with a preliminary comparison of Islamic law with the laws in other civilizations. The Romans, according to historians, were the greatest lawmakers. No other nation is considered their equal in this field. This claim is perhaps correct in so far as Europe is concerned. The Greeks, who preceded them, made a mark in many fields of knowledge but their contribution to law is not so eminent. One has to concede, therefore, that in the field of law, Rome is the Pioneer in Europe.

Colinet, the noted historian of Raman Law, says that the Roman law was primitive in the beginning. He frankly admits that the Romans were influenced by Asian laws with which they cam into contact with the expansion of their empire. Gaius, the oldest author of Roman law, was a resident of Asia Minor which is now Turkey. He was not a European. Roman law subsequently became more comprehensive because the Roman Empire covered the continents of Europe, Africa and Asia. Romans ruled over various nations with the result that they had to make additions to their own law which was amended, changed and expanded to meet the demands of the new situations. Justinian, who died a few years before the birth of the Prophet (peace be upon him), tried to codify Roman law in its amended form. In a way we can compare the code of Justinian with

Fatawa-'I 'Alamgidri.'[357] Auranzib 'Alamgir (d. 1118/1707) was certainly a patron of knowledge but he was not an outstanding scholar or jurist. The same applies to Justinian. He was a very intelligent king but was by no means an expert in law. He patronized scholars and invited them to collect and revise the laws of the empire some of which suffered from inherent contradictions. This is how a code lf law came into being. For Europe, it is a matter of great pride.

The Roman law is certainly interesting. It has many features which are still applicable and need no change. The law is based on the premise that man is the law-maker i.e. a man can accept or reject the law made by another man. The result is that man-made law lacks stability. Historians state that during his reign of thirty odd years Justinian himself made so many amendments to his own law that it was changed out of recognition. On the other hand, if the commandments of Allah are made the basis of law, it becomes stable, lasting and durable – qualities which cannot be expected in the man-made laws. All men being equal, they can challenge laws made by other men like them and can even reject them. The same phenomenon is observed in many other countries.

When the Prophethood was bestowed upon Muhammad the world faced a great legal challenge to produce a better code than the Roman law. The challenge was taken up by the Prophet (peace be upon him) who produced a code which, in reality, is far too superior to that of Justinian. It does not suffer from the drawbacks of the Roman law and has strength, durability and permanence. The Roman Law is devoid of the breadth and comprehensiveness found in Islamic law. The code of Justinian, for example, takes no notice of the religious needs of man and omits prayers and worship altogether. Similarly, many other features of Islamic law are conspicuous by their absence in the Roman law. Anyone who objectively compares the two will inevitably come to the conclusion that the Islamic law is definitely superior.

Sources of Islamic Law

Islamic law comprises the Divine commands revealed to the Prophet (pace be upon him). Part of the revelation was personally dictated by the Prophet (peace be upon him) who proclaimed that it was the word of Allah. This is called the Qur'an. The Prophet (peace be upon him) exhorted his followers to commit it to memory and recite it in their prayers lest they forget. He gave other orders as well. According to the Qur'an (see 53:3-4), those orders were also based on Divine revelation but did not form part of the Book. They are called the *Sunnah.*

---

[357] The Mugal emperor Aurangzib constituted a committee of eminent scholars that compiled a comprehensive code of Islamic Law which is known as *Fatawa-'I 'Alamgiri,*

The commands of Allah and the orders of the Prophet (peace be upon him) i.e. the Qur'an and the *Sunnah,* were not compiled overnight. The revelation of the Qur'an is spread over a period of twenty-three years. This is also true of the *Hadith.* But in the very beginning there were no guideline except the first five verses of *surah al-'Alaq (surah 96).* What, then, was the Islamic law for the early converts? The answer is simple. In Islam, the principle prevails that an act which is not forbidden is lawful. In other words, expect for idol-worship all other customs of the social life of contemporary Makkah were permitted. The early Muslims could use intoxicants for they were not then prohibited. Thus Islamic law began with the customary law of Makkah. The customary law was then gradually amended and changed. In accordance with commands contained in the Qur'an and the *Hadith,* pre-Islamic customs were changed or cancelled, according to as set of priorities, during a period of twenty-three years.

It is obvious that the first element of customary law that had to go was idol-worship. Idolatry was abolished. Worship of idols was absolutely forbidden. There was no compromise on the principle of the unity of Allah and none could be allowed to share power with Him. There was another fundamental feature of the faith. The Islmiac world-view covers not only this word but the Hereafter as well. The principle of accountability meant that man would be resurrected, would be asked to render an account and would be accordingly rewarded or punished.

These were the foremost features of the faith – belief in the unseen Allah and the Day of Resurrection. If we believe in One Allah, Who is our Master and Creator, we owe Him certain obligations. How are we to perform our duties on this account? It is obvious that Allah is not dependent on us but we are dependent on Him. It is our duty, therefore, to express our gratitude. To discharge this duty, prayers were prescribed. In the very beginning the Muslims were required to subscribe to certain beliefs and observe prayers. Other requirements were slowly added in the course of time.

The basic sources of Islamic law are the Qur'an and the *Hadith.* The customs of Makkah were also a source in the beginning, but they were of a temporary nature, for the Qur'an and the *Hadith* had the power to supersede and cancel the power to supersede and cancel the customs which, in any case, were non-obligatory and had an impermanent character. All his notwithstanding, there can be no denying the fact that local customs were the first source of law which was replaced by the permanent sources- the Qur'an and the *Hadith.* It is obvious from the tradition related about Mu'adh ibn Jabal that *ijtibad* had already assumed the status of a third source during the life-time of the Prophet (peace be upon him).

Books on jurisprudence mention yet another source. It is referred to as *ijma* 'i.e. consensus of the *'ulama'* on a given issue. This was not necessary during the period of the Prophet (peace be upon him) for he was there to attend personally to every problem that arose, and his decision was both binding and final. The question of consultation among the *'ulama'* with a view to reaching a possible consensus simply did not arise.

In addition to these sources, there was yet another which operated during the life of the Prophet (peace be upon him) and remained relevant after him. This source can be called "mutual agreements". If we reach an agreement with another state and enter into a treaty with it, the terms and conditions will remain binding for the duration of the treaty. They will become part of our law. In other words, treaty obligations or limitations mutually agreed upon become part of our law during the validity of the treaty.

Yet another source of law is the principle of reciprocity. We have not been able to trace an example of it during the era of the Prophet (peace be upon him). The earliest example belongs to the days of 'Umar. One of his governors in a frontier region sent a letter to Caliph 'Umar stating that some Byzantine traders from across the border had expressed a desire to visit the country on a trading mission. He enquired about the basis on which a tax could be lived on them. The governor knew nothing about the Islamic toll-tax. He looked up the Qur'an and found no mention of such a tax. Caliph 'Umar replied that the scale of taxation should be the same as applied to Muslim traders visiting Byzantium. This, then, was the law of reciprocity. There was no agreement with Byzantium on this issue, but the Caliph ruled that the rate of toll-tax charged from the Byzantine traders should be the same as was charged from Muslim traders visiting their land.

Yet another source which should have been mentioned earlier is cited in the Holy Qur'an. In *surah al-An'am (surah 6)* one comes across a lengthy list of about twenty-five Prophets. After the list follows the verse: "These it is who Allah guided aright, so follow their guidance" (6: 90). From the historical point of view this important verse in the Qur'an lays down that all commands given to Adam and the Prophets that came after him until Muhammad (peace be upon him) are mandatory for Muslims who are exhorted not to differentiate between one Prophet and another, and to show the laws, given to any of those Prophets, the same reverence that ought to be shown to the laws given to Muhammad (peace be upon him), for all these laws are, after all, Allah's laws. As the Qur'an says:

> The Messenger believes in that which has been revealed to him from his Lord, and so do the believers: all of them believe in Allah, and His angels, and in His Books, and in His Messengers, saying, "We make no distinction between any of His Messengers", and they say, "We hear and we obey".[358]

Allah is the law-giver. If he gave some laws to Adam or Moses, He alone can amend or change them. In other words, if Allah commanded the Prophet (peace be upon him) not to act upon certain specific instructions given to some of the Prophets who preceded him, then the old law will cease to operate and the new law will become mandatory. The previous Prophets ought to be followed. This is subject to the condition that posses authentic knowledge of the law obtaining in the period of the previous Prophets. We come across instances in the Qur'an and the *Hadith* where a particular law prevailed in the days of Moses or Abraham but the Qur'an itself accuses Jews and Christians of tampering with their scriptures. However, since the law of Moses and Christ has not reached us directly through reliable sources, we cannot act upon them unless a specific order is proved to be sound and reliable.

We need, thus, to add the laws of previous Prophets to the sources of Islamic law already enumerated. An example will help explain. *Surah al-Nur*[359] in the Holy Qur'an lays down a hundred stripes as punishment for adultery. But based on the precept and practice of the Prophet (peace be upon him) one comes across instances of adultery between married person being punished by stoning to death. what is the basis of this penalty which is not even mentioned in the Qur'an? Many people have been victims of a misunderstanding on this scores for they believe that the Qur'an prescribes only a hundred stripes and not stoning to death. But this is not so.

A careful scrutiny will reveal that the Qur'an has indirectly sanctioned this punishment. The Qur'an asks us to act upon the laws of previous Prophets. The law of stoning to death is found both in the Torah and the *Injil.* Even those editions of the scriptures which circulate among the Jews and the Christians today also contain this ordinance. Our Prophet (peace be upon him) has also verified that such a law existed. If the Qur'an does not mention this law, it means that it has not been repealed. In the absence of clear instruction to the contrary, the old law stands, and in such an event it becomes our law. It was not made by us. The law was made by Allah and it is mandatory for us. The Torah specifically states that in the event of adultery among married persons they should be stoned to death. However, for adultery among unmarried person, the guilty are merely required to pay a fine.

---

[358] Al-Qura'n 2: 285.

[359] *AlQura'n 24.*

The Qur'an superseded and abrogated this law. To impose only a fine would encourage immorality. A more effective deterrent was needed. A hundred stripes were, therefore, prescribed. When we see that the Holy Qur'an has, by its silence, maintained a part of a previous law and has explicitly abrogated another part, its action on both counts assumes the status of law. This is what is meant by the statement that the *Sbari'ah* or the Law of the Prophets of old is obligatory on us provided it has reached us through authentic sources and the Qur'an has not amended, changed or abrogated the previous law.

CHAPTER 17

RELIGIOUS TOLERANCE IN ISLAM AND THE ROLE OF AURANGZEB AND TIPU SULTAN

Under the colonial rule, British administrative officers, academicians, historians and archaeologists encouraged such myths, religious beliefs and practices which resulted in severe divide and conflict between Hindus and Muslims in India. Depending upon the legacy left behind by the British rule leading to communal divide, communal forces had their sponsored academicians have converted large number of Hindus to Islam. Scholars like Romila Thapar, K.N. Panikkar, etc. have made it clear that the temples. Were plundered and/or destroyed on economic ground and/or to crush the politics having been generated at these places against the ruler or it did symbolize and act of conquest been generated at these places against the ruler or it did symbolize an act or conquest outside the battle-field and the assertion of political power. These ugly instances did not thus happen because of religious fanaticism. Incidentally, some Hindu rules in ancient and early medieval Indian, did not lag behind some Muslim rules in plundering and destroy non-Hindu (particularly Jain and Buddhist) temples and other places of worship.

After critical examination of the Farmans of Mughal emperors scholars like Tarapada Mukherjee, Irfan Habib and B.N. Pande have opined that Mughal rulers issued land grants for the maintenance of Hindu temples. The aforesaid first two scholars have studied the Farmans of Akbar, Jahangir and Shah Jahan and have showed that these rulers had issued land grants to temples particularly in Vrindabana, Aritha and Mathura Dr. B.N. Panda, on the other hand, undertook the study of the Farmans of Aurangzeb and paid attention to the religious policy of Tipu Sultan. Dr. Panda was nice enough to deliver two lectures on the themes "Farmans of Aurangzeb and other Mughal Emperors" and "Tipu: An Evaluation of His Religious Policy" under the auspices of the Institute of Objective Studies at the Academic Staff college, Jamia Millia Islamia, New Delhi on the 17th and 18th November, 1993 respectively. In the first paper Dr. Pande has stated after a critical examination and analysis of the farmans of Aurangzeb collected from various parts of the Indian sub-continent, that the Mughal Emperor Aurangzeb had issued *jagirs* and cash gifts for the maintenance of temples, namely, Someshwar Nath Mahadav Temple situated at the confluence of Ganga and Yamuna at Allahabad, Mahakaleshwara Temple at Ujjain, Balaji Temple at Chirtrakut, Umananda Temple at Gauhati and the Jain Temple of Shatrunjal and other Temples and Gurudwaras scattered over northern India. Dr. Panda has cited instances which show that Aurangzeb ordered destruction of temples and mosques and the mention may be made of Vishvavath Temple at Varanasi and the Jama Masjid at Golkunda. But the reasons have to be viewed and investigated in proper historical perspective. The aforesaid temple had become the centre of conspiracy against the state and similar was the case with the mosque as highlighted by Dr Pande. On further investigation, it is reported that Aurangzeb had ordered raid of the temple in order to rescue women members of the family of a Minister of Rajasthan who had gone there on pilgrimage. The ruler of Golkunda after collecting reven of the state, did not pay his dues to the Empirial Authority came to know of it, he ordered the demolition of the mosque. Dr. Pande refuted the charge against Aurangzeb that he was an anti-Hindus monarch and has established that Aurangzeb did not make any distinction between temples and mosques so far as state administration was concerned Thus Dr. Pande has thrown new light on the role, character and personality of one of the brightest of the Mughal rulers.

In the second paper Dr. Pande has focused his attention of the issue of mass conversion at the time of Tipu-Sultan and opined that the Tipu's state, which may be generalized as medieval to modern Indian Muslim state, did not engage itself in any mass-scale conversion. However, it is a fact that there occurred cases of conversion during that time. Firstly these occurred at the mass level and secondly these were voluntary or on economic or other considerations or may be as consequence of the popularity of the Sufi saints who lived among the people and disseminated tenets of Islam to them in their own dialects and language. Following the legacy left behind by the Mughal rules, Tips Sultan made lavish gifts to Hindu temples particularly to Shri Ranganatha Temple located inside the Fort of Shrirangapatnam at Mysore. Tipu was an enlightened ruler and was secular in outlook. If he crushed the Hindus of Coorg, the Christians of Mangalore and the Nayars of Malabar the was due to the fact that they wished to undermine his authority by joining the British. He did not spare the Mopillas of Malabar or the Mahadvi Muslims or Nawabs of Sawanur or Nizam whenever he suspected such tendencies among them. Despite his long-drawn conflict and wide differences with the British, He did not hesitate to profit himself by western science and art of governance. Tipu was highly educated monarch who could enter into discussion with experts in Persian, Kannada, Marathi, and French languages. Tipu's approach towards socio religious issues was egalitarian. He abolished the custom of human sacrifice to kali Temple

(Mysore), banned the use of liquor and the cultivation of *bhang*, dried leaves of which are highly interaction made prostitution and the exploitation of female salves illegal and took measures to safeguard the honour and modesty of the Nair Women. Dr. Pande has pointed out the Tipu was a devout Muslim and not a bigoted one. He has strongly refuted the charge leveled by some Hindu communalists that Tipu was anti Hindu and it has convincingly been established that on the basis of religion Tipu made no distinction among his people.

During 1948-53, when I was the Chairman of the Allahabad Municipality, a case of mutation (Dakhil Kharij) came up for my consideration. It was a dispute over the property dedicated to the temple of Someshwar Nath Mahadev, situated at the confluence of Ganga and Yamuna. After the death of the mahant, there were two claimants for the property. One of the claimants filed some documents which were in the possession of the family. The documents were the farmans issued by Emperor Aurangzeb were genuine. Then he asked his clerk to bring the file of the case of Jangum Badi Shiva Temple of Varanasi, of which appeals were pending in the Allahabad High Court for the past 15 years. The mahant of the Jangum Badi Shiva temple was also in possession of various other farmans of Aurangzeb granting Jagirs to the temple.

It was a new image of Aurangzeb the apperared before me. I was very much surprised. As advised by Dr. Sapru I sent letters to the mahants of various important temples of India requesting them to sent me Photostat copies, if they are in the possession of the farmans of Aurangzeb, granting them jagir for their temples. Another big surprise was in store for me. I received copies of farmans of Aurangzeb from the great temples of Mahakaleshwara, Ujjain, Balaji Temple, Chitrakut, Umanand Temple, Gauhati and the jain temples of Shatrunjai and other temples and Gurudwaras scattered over northern India. These farmans were issued from 1065 AH (1659A.D.) to 1091 AH (1685A.D).

Though these are only a few instance of Aurangzeb's generous attitude towards Hindus and their temples, they are enough to show that what the historians have written about him was biased and is only one side of the picture. India is a vast land with thousands to temples scattered all over. If proper research is made, I am confident, many more instance would come to light will show Aurangzeb's benevolent treatment of non- Muslims.

In the course of my investigations on the farmans of Aurangzeb I came in contact with Shri Gyan Chandra and Dr. P.L. Gupta, the former Curator of Patna Museum. They have also been doing research of great historical value on Aurangzeb. It pleased me that there were some other scholar- investigators of truth who were contributing their share in clearing the image of much maligned

Aurangzeb, whom the biased historians have made the symbol of Muslim rule in India. An aggrieved poet has sorrowfully said:

Tumhen ledeke sari dastan men yad hai itna;
ke Alamgir Hindukush tha zalim tha sitamgar tha.

(i.e. of the whole story of the Muslim, rule in India they remember only this much that Alamgir was a butcher of Hindus, and a tyrannical and cruel monarch).

While accusing Aurangzeb as an anti-Hindu monarch, much has been made of a farman, which is popular by the name or 'Banaras Farman'. This *farman* belongs to a Brahmin family of Varansi (Banaras), resident of Mohalla Gauri. In 1905 it was produced before the City Magistrate by one Mangal Pandey, son of Gopi Upadhyaya's daughter. It drew attention of the scholars and it was published for the first time in the journal of the Asiatic Society of Bengal in 1911. And since then it has been often quoted by the historians. Without realizing the real importance of the farman, they accuse Aurangzeb of banning the construction of Hindu temples.

This farman was issued by Aurangzeb on 15 jamadi, 1105 A.H. (10, March, 1659) to the local officer of Banaras in disposal of a complaint made by some Brahmin, who was the custodian of a temple and was being harassed by some person. It runs as follows:

"Let Abul Hasan worthy of favour countenance trust to our royal bounty, and let him know that since in accordance with our innate kindness of disposition and natural benevolence, the whole of our untiring energy and all our upright intentions are engaged in promoting the public welfare and bettering the conditions of all classes, high and low. In accordance with our holy law, we have decided that the ancient temples shall not be destroyed but new ones shall not be built.

"In these days of our justice, information has reached our noble and most holy court that certain persons interfere and harass the Hindu residents of the town of Banaras and its neighborhood; and the Brahmin Keepers of the temples, in whose charge these ancient temples are; and that they further desire to remove these Brahmins from their ancient offices, and this intimidation of their cause distress to that community.

> "Therefore, our command is that, after arrival of this lustrous order you should direct that, in future, no person shall in unlawful way interferer or disturb the Brahmins and other Hindu residents at these

> place, so that they may, as before, remain in their occupation and continue with peace of mind to offer prayers for the continuance of our God-gifted Empire, so that it may last forever. Treat this order as urgent".

This farman is explicitly clear on the point that Aurangzeb did not issue any new order against the building of the new temples. He only referred to the practice that was already in continuance and he simple affirms to adhere to that practice. As regards the already existing temples, he is explicitly against their destruction. The farman further shows that he was keen on his Hindu subjects being able to live in peace.

It is not the only farman of its type. Banaras has one more farman to show that Aurangzeb was really very keen that the Hindus should be able to live in peace. It runs

> "At this auspicious time an august farman was issued whereas Maharaja Dhiraj Raja Ram Singh of Ramnagar (Banaras) has represented to the most holy and exalted court that a mansion was built by his father in Mohalla Madho Ram, on the bank of Gangaat Banaras for the residence of Bhagwat Gossain who is also his religious preceptor, and as certain persons harass the Gosain, therefore, our Royal Command is that, after the arrival of this lustrous order the present and future officers should direct that in future, no person shall in any way interfere or disturb the Gosain, so that he may continue with peace of mind to offer up prayers for the continuance of our God-given Empire, that is destined to last for all time. Consider this as an urgent matter. Dated 17th Rabi, 11, 1091 A.H."

Some other farmans with the Mahant of the jangambari Math, show that Aurangzeb never tolerated any encroachment on the rights of his subject whether they were Hindus or Muslims. He dealt severely with the culprits. One of these farmans, refers to a complaint field in the court of Aurangzeb by the jangams (i.e. the followers of jangam a Saivite sect) against a Muslims resident of Banaras named Nazir Beg and the imperial order there on syas: "The officials of Haveli Muhammadabad known as Banaras, Subah Allahabad are to be informed that these days Arjunmal and jangams, residents of Pargana Banaras, have appeared before the Emperor and have made complaint that Nazir Beg, a resident of Banaras, has by force taken possession of five Havelis, which they had in qasba Banaras. It is therefore, ordered that if their case found true and the title of the complainant is proved, Nazir Beg should not be allowed to enter the said Havelis so that in future the Jangams may not have to appear as complainants before me to seek their redress."

This farman is dated 11th Sh'aban, San 13 Julus (1672 A.D.)

The other farman in the possession of the same Math dated I Rabi-al-awwal, 1078 A.H. relates to the restoration of the possession of the land that was granted to the jangams. It runs:

> "All the present and future jagirdars and Karoris in pargana Havelis Banars, subah Allahabad are informed that according to the order of the Emperor dated 9 Amardad illahi, 178 bighas of land has been granted to the jangams to help them in their maintenance. The old officials have verified this fact before this. On the present occasion also they have produced evidence bearing the seal of the Malik of the said paraganas to the effect the they are, as before, in possession of the land and their title is clearly proved. Therefore, according to the order of Emperor, the same has been left to them as the sacrifice (Nisar) for the head of the Emperor. The said land should be returned to them from the beginning of the kharif crop of San 10 as it was before and they should and they should not in any way be interfered with, so that these jangams may utilize the income of every crop in their maintenance and pray for the existence of the kingdom of the Emperor. Herein they shall fail not and act otherwise."

This farman does not only show that justice was inherent in him, but also that he made no distinction in distributing the Nisar to Hindu mendicants. The said land of 178 bighas was in all probability donated to the jangans by Aurangzeb himself as we have another farman dated 5th Ramadan 1071 A.H. which refers to this land in following terms:

> "The present and future officials of Pargana Haveli, Banaras, Subordinate to Subah Allahabad, are to be informed that under the order of the Emperor to the effect those 178 bighas of land in pargana Banaras is allotted to jangams to help in their maintenance. The jangams have appeared at this time also in the Darbar of the Emperor. Their rights are proved and that the same persons are alive and in possession of the land. Therefore, the said land has again been give to them as before as a sacrifice for the head of the Emperor. The said land should be treated as mufti land as detailed

> below so that they may utilize it and may pray for the continued existence of the kingdom of the Emperor."

Another land-grant to a Hindu religious preceptor in the town of Banaras was given by Aurangzeb in 1098 A.H. which is as follows:

> "At this auspicious time an august farman was issued that as two plots of land measuring 5.8 dira' situated on the bank of the Ganga at the Benimadho ghat, in Banaras (one plot is in front of the house higher up) are lying vacant without any building and belong to Bait-ul-mal, we have, therefore, granted the same to Ramjivan Gosain and his son as inam, so that after building dwelling houses for the pious Brahmins and holy faqirs on the contemplation of God and continue to offer prayer for the continuance of our God-gifted Empire that is destined to last for all time. It is, therefore, incumbent on our illustrious sons, exalted ministers, noble umara, high officials, daroghas and present and future Kotwals, to exert them for the continual and permanent observance of this hallowed ordinance; and to permit the above mentioned plots to remain in this hallowed ordinance; and to permit the above mentioned plots to remain in the possession of the aforesaid person and his descendents exempt from all dues and taxes, and not to demand from him a new sanad every year's.

Aurangzeb seems to be very careful to respect the religious sentiments of his subjects. 7 we have a farman of the Emperor issued on 2 Safar of the ninth year of his reign, in favour of Sudaman Brahmin, the pujari of Umanand temple of Gauhati in Assam. This temple and its Pujari, were granted a piece of land and the income of some forest for the bhoga (offering to God) and the maintenance of the Pujari by the Hindu rulers of Assam. When Aurangzeb occupied the province, he immediately issued the said farman confirming the earlier Hindu grant of the land and income in favour of the said temple and its Pujari.

The text of the Gauhati Farman runs as follows:

> "Be it know to the present and future administrators of important affairs, Chaudharies, Qanoongos, muqaddams and peasants of patta Bengesar in the Pargana of pandu in the Sarkar of Dakhinkul that 21/2 Biswa of land out of village Sakara. The jama (total revenue) of which was thirty rupees, was settled on Sudaman and his son, the Pujari of Umanand, according to the orders of the previous rulers. At this time the truth of the title (claim) out of the aforesaid maintenance rupees twenty cash out of the *Mahsul* (collections) of

> the said village and the rest of it… the jungle land exclusive of the Jama from *intakhali* village being settled as the maintenance of the aforesaid grantee. It is incumbent upon them (officers) to leave the cash and the land in possession of the above mentioned perpetually, permanently and for life-time after separating from both the Mahals so that they (grantees) may utilize them for their maintenance and bhog and engage themselves in prayers for the continuance of the kingdom to eternity. They should not allow any let of hindrance on account of revenue taxes and other cases or demand of fresh Sanad and if there be they should not rely upon it. Considering this as binding upon them, they should not swerve from it. Written on the 2nd of safar in the 9th year of the Accession of Hus Majesty."

That Aurangzeb had the attitude of the tolerance towards Hindus and their religion is further supported by the priests of the Mahakaleshwar temple at Ujjain. This is one of the chief temples of Siva, where *deep* light is burnt day and night, continuously without any break. This *deep* is known as Nanda *deep*. And the priests of the temple sat that it continued in the Mughal period also; and even Aurangzeb honoured this ancient tradition. Unfortunately they have no royal order to support their claim. But they have a copy of an order issued by Murad Baksh, during the reign of his father dated 5th Shawwal 1061 A.H. This order was issued by him of behalf of the Emperor on the petition of one Devanarain, who was the then priest of the Mahakaleshwara temple.

Hakim Muhammad Mehdi, the Waquinawis, looked into the old records and testified to the claim of the petitioner. Thereupon, it was ordered that four sers (Akbari) ghee be provided by the tahsildar of Chabutra Kotawali for said *deep* of the temple.

The copy of this order was issued by Muhammad Sadullah in the year 1153 A.H. i.e. 93 years after the original was issued.

The present priest infer from the issue of the copy after such a long interval that the original order continued at be carried on during all this intervening period which covers the reign of Aurangzeb also. Had this order no worth at this late period, no one would have cared to obtain the copy of a dead letter. Some other royal papers deposited in the archives of the said temple were brought to my knowledge by the then *Mahant* Lakshman Narain who also possessed a few papers of the time of Aurangzeb.

Generally historians talk of the demolition of Chintaman tmple constructed by the Nagarseth of Ahmedabad but they remain dumb on the fact that the same Aurangzeb gave lands of the Shatrunjaya and Abu temples to the same Nagarseth.

The *Sanad* granting land to the Sahtrunjaya temple runs:

> Satidas, the jewelers has presented to that noble most holy, exalted and elevated presence through persons who constitute the holy assembly of the court, that whereas according to a *Farman* of his Majesty, the exalted (and) as dignified as Soloman, the protector of the office the successor (of Muhammad) the shadow of God, dated the nineteenth of the holy month of Ramadan, in the year thirty one, the district of Palitana, which is called Satranja in the jurisdiction of the Sorath Sarkar, a dependency of the Subah of Ahmedabad (and revenue of which two lacs of Dams) has been sttled as a perpetual. In′ am on the petitioner (and) that he (the petitioner) therefore, hopes that a glorious edict may also be granted by our court. Therefore, in the same manner as before we have granted by our court. Therefore, in the same manner as before we have granted (to the petitioner) the above mentioned district as a perpetual In′am It is, therefore, incumbent on the present and the future managers of the Subah and the above mentioned Sarkar, to exert themselves of the continual and permanent observance of this hallowed ordinance (and) to permit the above mentioned district to remain in possession of the above-mentioned person and of his descendants in the lineal succession from generation to generation, and to consider him exempted from all demands and taxes and all other dues and not to demand from him in respect hereof a new sanad every year, and they shall not swerve from this order. Written on the 9th of the month of Telkakand in the Hijra year 1068 (1658).″

The nagarseth the helped Aurangzeb in some wars, and being pleased with his services he gave some land-gift at Girnar and Abu to the temples therein. It runs thus:

(Seal) Abu Muzaffar Muhy-ud-Din Muhammad Aurangzeb ′Alamgir Badshah Ghazi.

At this time, the exalted Framan is issued that since Shantidas jawahari, son of Sahasbhai, of the Shrawak community has solicited and been hope- full of special favours, and has greatly helped the army during its smarch with provisions, and experts to be honored with special rewards, therefore; the village (deh) of Palitana, which is under the jurisdiction of Ahmedabad, and the hill of Palitana, famous as Satrunja, and the temple on it, all those we give to the said

Satidas jawahari of the Shrawak community and the timber and fuel which is to be found on the hill of Satranja should belong to the Shrawak community, so that they may utilize these for whatever purpose they like. Whoever guards the hill of Satranja and its temple should be entitled to the income of Palitana, and they should continue in prayer for the maintenance of the eternal government. It is necessary that the administration and officers and the jagirdars and the karoris of the present of future should absolutely not allow any deviation or alteration in this.

> "Besides this there is a mountain in junagarh, famous as Girnal (Girnar), and there is another hill at Abuji under the jurisdiction of Sirohi. We give these two hills also to Satida Jawahari of Shrawak community as a special favour so that he may be entirely satisfied. It is necessary for the officers that they should not allow anyone to interfere with these, and no one among the Rajas should obstruct him and they should always help him as such action will bring to them royal pleasure. And they should not demand a new sanad every year, and if anybody makes any claim about that village and the three hills, which we have given to him he will be liable to the censure and curses of the people as well as of God. Another separate sanad has also been given to him.
>
> Written on the tenth of great Rajab, the Hijri year 1070 (March 13, 1660)"

But there are instances which prove beyond doubt that Aurangzeb did order the demolition of Vishwanath temple at Varansi and the jama Masjid at Golkunda, and the reasons that were given out for the demolition of the temple and the mosque may give benefit of circumstances to Aurangzeb. The story regarding demolition of Vishwanath temple is that while Auranzeb was passing near Varanasi on his way to Bengal, the Hindu Rajas in his retinue requested that if halt was made for a day their Ranis may go to Varanasi, have a dip in the Ganges and pay their homage to Lord Vishwanath. Aurangzeb readily agreed. Army pickets were posted on the five mile route to Varanasi. The Rains made a journey on the Palanquins. They took their dip in the Ganges and went to the Vishwanath temple to pay their homage. After offering puja all the Rains returned except one, the Maharani of Kutch. A thorough search was made of the temple precincts but the Rani was to be found nowhere. When Aurangzeb came to know of it, he was very much enraged. He sent his senior officers to search for the Rani. Ultimately, they found that the stature of Ganesh which was fixed in the wall was moveable one. When the statue was moved, they saw a flight of stairs that led to the basement. To their horror, they found the missing Rani dishonored and crying of all her ornaments. The basement was just beneath Lord Vishwanath's seat. The Rajas expressed their vociferous protest. As the crime was heinous, the Rajas demanded exemplary action. Aurangzeb ordered that as the sacred precincts have been despoiled, Lord vishwanath may be moved to some other place, the temple be razed to the ground and the Mahant be arrested and punished.

Dr. Pattabhi Sitaramayya, in his famous book, "The Feathers and the Stones" has narrated this fact based on documentary evidence. Dr. P.L. Gupta, former Curator of Patna Museum, has also corroborated this incident.

Demolition of Golkunda Jama Masjid now, about the demolition of Jama Masjid: The ruler of Golkunda, the famous Tanashah after collecting revenues of the State did not pay his dues to Delhi. In a few years they were accumulated in to crores. Tanashab buried this Khazana and erected a Jama Masjid over it. When Aurangzeb came to know of it, he ordered the demolition of the mosque. The buried Khazana was seized and utilized for the benefit of the people. These two examples are sufficient to show that Aurangzeb did not make any distinction between temple and mosque in the matter of judicial finding.

Calcutta University and sent him all the correspondence that I had exchanged with Dr. Shastri, with the request to take appropriate action against the offending passages in the text-book. Prompt came the reply from the Vice-Chancellor that the history book by Dr. H.P. Shastri has been put out of course.

In early 1930 Mahatma Gandhi published this note in his young India endorsing the liberal religious policy of Tipu Sultan:

> "Tipu made lavish gifts to Hindu temples, and also to the temples dedicated to Shri Venkataramana, Shrinivas and Shri Ranganatha located in the cicinity of Tipu's palaces still bear testimony to his broadminded toleration, and indicate that great martyr at any rate- for a real marty he was in the cause of liberty- was not disturbed in his prayers by the Hindus bells calling people to worship the same God whose devotee he was. Tipu died fighting for liberty treating with contempt the suggestion that he should surrender to the enemy. When Tipu's corpse was recovered from among the heap of "unknown soldiers" whose fate he proudly shared, it was found that even in death his hand had still clutched the sword which was his instrument for the vindication of liberty. Let us remember the following memorable words of Tipu:

> "Better a lion's life for two days than a Jackal's life for two hundred years" and also the lines repeated at the end of each stanza of an elegy composed in his honour: "Ya Allah, it is better to die beneath the cold of battle raining blood upon our heads that to live a life of shame and degradation".

> "One of the principal and oft-repeated accusations is that Tipu was bigoted Muslim who oppressed non-Muslims. We would point out that accusations of bigotry against the Muslim rulers in India have ever been pressed into service for promoting hatred and hostility between the Hindus and Muslims. That Tipu was a devout Muslimis true, but there is a world of difference between bigotry and devotion to one's own faith."

We may say that an objective study of the sources would reveal that Tipu was an enlightened ruler, and was secular in outlook. If he crushed the Hindus of Coorg, the Christians of Mangalore and the Nayars of Malabar, that was because they wished to undermine his authority by joining the English. Nor did he spare the Mopillas of Malabar or the Mahadvi Muslims when he suspected such tendencies in them. He attacked the Nawabs of Sawanur, and also of Cuddapah and Kurnool, and was more hostile towards the Nizam than towards the Marathas. His harshness at times was under political compulsims. Again the records show that he never allowed pleasure or sloth, bigotry or conservatism to interfere in his administration. Despite his differences with the English, he desired to profit himself by western science, and western art of Government. The result of his policy is well-summed up by his own contemporary, an English may, Edward Moore in 1794, who was by no means friendly to him; "When a person travelling travelling through a strange country finds it well-cultivated populous with industrious inhabitants, cities newly founded, founded, commerce extending, towns increasing and everything flourishing so as to indicate happiness, he will naturally conclude it to be under a form of Government congenial to the minds of the people. This is a picture of Tipu's country, and our conclusion respecting its Government." Tipu belongs to that category of men who live and die for a mighty cause. He is the solitary figure of the eighteenth century, so innovative, so enlightened, so dynamic and so patriotic, but so much maligned.

Tipu was born and brought up as a prince. He was named Tipu after the well-known Pir at Arcot Tipu Mastan Auliya and also Fateh Ali after his grandfather. Unlike his father, Haider Ali, Tipu was highly educated person. More than all, he was cultured and urbane monarch who could speak Persian, Kannada, Marathi and French languages. He had read deeply the humanities and sciences. That the diversity of his interest and his insatiable thirst for knowledge were amazing had been vouchsafed by his library adorned with rich and brilliant volumes covering many subjects like history, philosophy, theology, sefism, ethics, jurisprudence, Philology, literature, Turkish prose and fables, Hindi and Deccani prose and poetry, arts, sciences, mathematics, astronomy, physics, medicine etc, and also by the manuscripts and books in Arabic, Persian, Turkish, Urdu, Hindi, Sanskrit and other languages. He had read avidly the French Philosophers and discussed seriously with his French friends the new political social and economic ideas that were flooding the world at that time. In 1794 Dove ton expressed his amazement at Tipu's comprehension of world affairs and his awareness of international events. With this background he succeeded his father as the Sultan of Mysore. But his position was by no means unenviable one. For he had to preserve his authority against the onslaughts of his allegiant Polygram and governors and the disobedience and treachery of his courtiers, and to maintain his independence against the three mighty powers which were ever on the move to attack him and crush him. Thus from the day he occupied the seat of royalty, during the seventeen years following, to the end of the century he was constantly engaged in an exhausting external war and often harassed by the mischief of malcontents within. It is highly creditable that inspire of such ceaseless and ruthless struggles for the survival and maintenance of his authority against the implacable foes, Tipy found time for the business of politics, trade and commerce, religion and all other matters relating to the people and his approach and the regulation he issued on all matters were always egalitarian.

Tipu's approach to social and religious issues was certainly characterized by egalitarianism. He abolished the cruel custom of human sacrifice to Kali temple near Mysore, banned the use of liquor and the cultivation of bhang, punished the faqirs administer in intoxicating drugs to the inhabitants and travelers by banishment, made prostitution and the exploitation of female slaves illegal and took measures to safeguard the honour and modesty of the Nair women by decreeing that they should come out of their honour and modesty of the Nair women by decreeing that they should come out of their houses fully dressed and the practice of polyandry should be given up. As K.M. Panikkar rightly puts it, in imposing prohibitions against such obscene habits of the Nairs, Tipu believed that he was undertaking a mission of civilization. It is the reformer's mind, anxious for the moral and material welfare of the people and not the fanaticism of mind, anxious for the moral and material welfare of the people and not the fanaticism of a bigot desirous of converting the Kafir that speaks in these proclamations. His concern for the women's welfare was clearly expressed when he ordered that the orphaned and abandoned girl should not be taken into the temples, nor to be sold abroad, but collected together to be looked after by the Government. He infused self-confidence in the physically disabled like the lame and the blind, by providing them work in the workhouses. He also took steps to feen and trains the orphans and other uncared for persons for works in military and civil branches. He provided for the maintenance of the widows and children of soldiers who died in service and on the battlefield. He also ordered his officers that whenever a peon died, they had to appoint a fit member of his family in his palace give him the land and if the latter died heirless, they should get the land cultivated by some able bodied persons. Under him such public works as the reconstruction of the villages that suffered at the hand of the poligars and the rebuilding of places that were in ruins were undertaken. All these go to show that Tipu was social reformer having a great concern for the weaker section of the society.

Religiously also Tipu was an enlightened and egalitarian Sultan. But the British writers like Charles Stewart have painted him as a bigoted Sultan who practice religious discrimination and intolerance and carried on forcible conversions, religious genocide and wars. All the record refutes these allegations. The equal taxation imposed on all subjects regarding land, trades and profession; the existence of a Qazi and a Pandit in each province and two judges, on Hindu and the other Muslim in the High Court of Appeal at Srirangapatnam; his calendar which was acceptable to both the Hindu and the Muslims; the figure of elephant, the Hindu insignia of royalty found on his copper coins; the large number of Hindu holding posts of distinction in his administration like Purnaiah, Appaji Ram, Srinivas Rao, Moolchand, Sujan Rao and others; a section of the official quarter in Srirangapatnam reserved for housing Brahmin Families; the peaceful co-existence of Hindus, Muslims and Christians in his land showing the prevalence of social harmony, all thee testify that he never practiced religious discrimination, nor he was for class dominated of the Muslims. He was not an idol breaker or a temple destroyer. On the contrary, he saw to it that all the Hindu temples flourished in his kingdom by extending to them active encouragement and financial support. His correspondence with the Jagadguru of the Hindu muth at Sringeril; the protection he gave to it and money. Grains and clother presented to it and the steps he took to set right the ravages caused by Hindu raiders; the presentation of the 12 elephants, jewels, gold and silver vessels to Sri Narayanswami temple at Melukote[2]; the silver cup to Sri Srikanteswara temple at Nanjangud and the famous 'Padshah ling' made of greenjade installed there[3]; seven silver cups and a silver incense burner to Sri

Venkataramana and Tirumala Ratangiri; the donations he gave for the building of an abode of god at Conjeevaram, his participation in the chariot festival and the money he gave for the fire-works display on that occasion; the expenses of the pushapagiri muth, the Anjaneyaswami temple of Gandikote, the Narasimhaswamy temple of Gattupet, the Chennakesvaswami temple of Manchuur, the Prasnna Venkateswara temple in Mature and Sri Ranga temple in Prevali he met[4]; the discontinued Puja he restored at the Anjanewara temple at pullivenda; the inam lands he gave to Brahmins like Maharaja Hariappa; the regular cash allowance he gave to the Pujaris of Rayakottai temple[5]; his impartial judgement over a temple dispute between the two sects of Sri Vaishnawas called Vadagalai and Tenkalai in Melukote[6]; all these are silent but a solid proof that the Hindus received help and encouragement from his and lived in peace practicing their dharma. Even with regard to the Christians he followed a policy of egalitarianism. He looked after the welfare of the Syrian Christians and the Armenian Christians, requested the Archbishop of Goa to send Catholic priests for the service of the Christians in Mysore and got a Dutch bell which he brough down from a local church[7].

Tipu Sultan was an enlightened ruler. He knew that he was Muslim ruler of a non-Muslim country in which Muslim formed only a small segment of the population. He knew the limitations of his power and that he could not administer the state on principle unacceptable to his non-Muslim subjects. The treatment meted out to the reactionary feudal aristocracy of Malabar and Coorg should not be torn out of context to indicate that Tipu had any 'religious mission' nor the expulsion and captivity of the Canara Christians should be viewed as religious persecution. They were administrative actions dictated by political considerations for the safety of one of the most strategic regions of his kingdom. Similarly, He expelled the Mahdawis not because they were a non-conformist sect of Muslims, but because he found them to be conspiring against him and acting as compradors of hostile forces pitched against him.

Unlike his father, Tipu was well educated and possessed sound knowledge of Islamic religion. But he never allowed his personal belief to come in the way of his administration and remained secular throughout in the discharge of his duties as head of the State. One, by way of a complaint, a faujdar reported to him that, "a Hindu had married a Muslim lady causing tension in the locality. As such a marriage was not permitted in the Shariatm what action should he take to punish the culprits". Tipu immediately sent a reply admonishing the faujdar with direction not to interfere in or meddle with the personal affairs of the people and the as an officer of the government his duty was to safeguard the life and property of the people and ensure law and order.

Tipu was a learned man and was fond of Scholars. His Darbar was graced by many learned Hindu Pandits and Muslim divines. His extensive library was filled with valuable and rare books. He lived a simple, clean and disciplined life. His daily meals consisted mostly of almonds, milk and fruit. He never touched liquor or any other intoxicants.

Tipu had great respect for women and did everything to safeguard their honour and virtue. In his battles he took every possible precaution against molestation by his soldiers of the women of vanquished foe and came down with a very heavy hand on anyone found misbehaving in this respect. Twice in his battles with the Marathas, a number of Maratha women, some of them wives of Maratha Sardars, fell into his army's hands. On both the occasions, he treated them with respectful consideration, put them up in separate tents, and although the war was still on, sent them to the Maratha camps in palanquins escorted by his soldiers.

A brave and able military commander, Tipu was the worthy son of a worthy father. He won his first battle when he was only seventeen. He could never get over his defeat in 1792 by the combined forces of the English, the Marathas and the Nizam. The odds against him were heavy but he felt the defeat and the humiliating treat which followed it, so much that as a sort of penance, he gave up sleeping on a bed and used to lie down on the bare-floor with an odd piece or two of rough canvas under him. He had "come to a serious determination by every reasonable means in his power to regain what he had lost" (Malcolm). Of the many epitaphs on Tipu's tomb, one of the aptest is "*Shamsheer Gum Shud*" (the sword is lost). According to the numerical value assigned to the Persian alphabet, the phrase Shamsheer Gum Shud give the Hijra year of Tipu's death. Lost indeed was the sword wielded by a selfless patriot and ardent lover of freedom who, like his father, refused to have any truck with enemies of his country's freedom.

Is was sometime in 1774, around the time of Tipu's marriage, that his father, Hyder Ali, asked him what he wanted. He asked for a library but not one limited to the ideas and knowledge of the East. The young prince wanted to know all there was to know, and it was as part of this project that some time at the end of 1776 Count Vergennes, the French Foreign Minister, approached that contemporary of Voltaire and author of both the Barber of Sevilee and Figaro, Piorree Caron de Beaumarchais, to provide books that were both outstanding and learned for the Mysore library.

Among the works that he included was a Persian translation of the American Declaration of Independence draw up by Thomas Jefferson and adopted by the Congress to the United States of America at Philadelphia on 4,July,1776. Initially what must have drawn the young prince to the document was the similarity of experience of both the American colonists and the Indians, of British tyranny, for the document says of the English king; "He has plundered our seas, ravaged our coasts, burnt our towns and ravaged the lives of our people… In every stage of these operated petitions have been answered only by repeated injury, a prince whose character is thus marked by every act which any define a tyrant, is unfit to be ruler of a free people".

Later, he was impressed by the idea that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights. That among this are life, liberty, and the pursuit of happiness that to secure these rights, that among these are life, liberty, and the pursuit of happiness that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed, the whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute a new government laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to affect their safety and happiness."

Tipu's interest in the American Revolution persisted and he acquired such respect of the genius of Benjamin Franklin then that he paid a large sum of money to the Prussian charlatan, Schwartz, posing as a missionary, to be sent on to the American revolutionaries. Schwartz, who later became a British spy, of course, used the money himself and never sent it on. Again on 4th July, 1783, Tipu fired a 108-gun salute to the victory of the United States of America over the British.

Nor the young Tipu was superficial in his outlook. He knew the works of locke, Montesquieu, Rousseau and Voltaire, among others. Also his study of Arthashastra, the Rig veda and Atharva Veda, with their understanding of monarchy as the result of a social contract and entailing social responsibility, enshrined in the king's oath the "May I be deprived to heaven, of life, of offspring if I oppress you. In the happiness of my subjects lies my happiness, in their welfare my welfare; whatever pleases myself I shall consider as good," helped him assimilate the thinking with that emanating from indigenous roots.

Tipu became a member of the Jacobin Club, addressed letters to the Jacobins as "Citizen Tipu" and planted a tree of liberty at Srirangapatnam. The extent of his assimilation of new thinking can be judged from an address to is council of Ministers in 1789, refusing forced labour to build the Darya Daulat

Place. In his address he said; "The Pharaohs built the pyramids with the labour of their slaves. The entire route of the Great Wall of China is littered with the blood and bones of men and women forced to work under the whip and lash of the slave-drivers. Countless millions were enslaved and chained and thousands upon thousands bled and died to make it possible that the magnificent structures of Imperial Rome, Babylon, Greece and Carthage should be built. To my mind every great work of art and architecture be it in countries to the west or to the east of India, is a monument not so much to the memory of those who ordered them to be built but to the agony and toil, blood and tears of those unfortunates who were driven to death in the effort to built it. What does such a monument standing impassive in brick or stone commemorate? I believe its message is that here around it is the ruin or an empire founded on glory or achievement if the foundation of our places, roads, dams is mingled with tears and blood of humanity.

In 1785, Tipu pre-dated the breast-cloth struggle in Malabar by more than a century. Tipu lift horrified that women of certain castes were not allowed to cover their breasts. When informed that this was the custom, he asked, "Do customs of this tribe impose any corresponding disability on males also? If not, such a disability on women alone in contrary to principles of justice and is, therefore discriminatory8."

With regard to the administration of justice, in a decree of 1786, Tipu says, "Flogging and whipping- be they to extract confessions or as punishment- are repugnant to humanity and reason. They do not achieve their purpose. They degrade victim. They dishonor the person in whose name they are ordered.

His "Code of Conduct", both in war and peace, was based on the same humane principles. His code of Law and Conduct of 1787 states: "To quarrel with our subjects is to go to war with ourselves. They are our shield and our buckler; and it is they who furnish us with all things. Reserve the hostile strength of our empire exclusively for its foreign enemies."

Even with regard to fighting foreigners, in repeated decrees of 1783, 1785 and 1787, he states: "Looting a conquered enemy enriches a few battlefields. Do not carry them to innocent civilians. Honour their women, respect their religion, and protect their children and the infirm."

One of those who had been present at Tipu's farewell to his French soldiers in 1783, Gourgaud, was among the men and women who stormed the Bastile. As he lay there dying mortally wounded by bullets of the royalist troops, he said, "Let Tipu Sultan know that I died for a dream that he inspired." Through him, Tipu was part of the French Revolution in its finest hour10.

River Kaveri was the life-line of the kingdom of Tipu Sultan. The river encircled and embraced their capital, Srirangapatnam, a safe Island lying between its two branches. It was the main source of irrigation in the length and breadth of the state. In had its strategic value al around the fort of Srirangapatnam as a natural defense barrier. In addition, it supplied water to the city. Tipu Sultan has always realized its value and importance, and had great regard for it. A study of his letters, farmans, records etc. throws light on the above facts and substantiate them. As a boy and as a ruler he had lived by the side of Kaveri and had used its waters, rather had lived on it. He constructed amicus and founded dams on it though he could not complete them in his life time, and he caused channels to be dug out of it for irrigation purposes. His agrarian reforms and developments were based mainly on the water of Kaveri. He sacrificed his life and gained martyrdom by the side of Kaveri fighting at its famous water gate.

Tipu Sultan was killed fighting on the 4th May, 1799 by the English invaders and his capital was plundered for three days. Thousands of citizens were murdered brutally and even those who took refuge in mosques and temple were not spared. Sacred places were desecrated. The drunken English soldiers carried away everything valuable. Buildings and houses were demolished in search of buried treasures. Not only valuables like gold, Silver, pearls, silk etc., but also books of the Sultan's library, letters, record and all writings were looted and transported to Calcutta and England. *Sanads* given by the sultan were withdrawn and instead fresh certificates were issued.

REFERENCES :

1. This farman was brought to light by S.M. Jafar, Esqr., Director of Archives, Pakistan, to Shri Gyan Chandra.
2. High Court papers regarding the appeal filed in Allahabad High Court by Krishna Giri and other against Jagatguru Shri Mahant Malik Arjun Swami in 1934, Exhibit 20.
3. Ibid., Exhibit No. 11
4. Ibid., Exhibit No. 16
5. This Farman Brought to the notice of Gyan Chandra by S.M. Jafar Esqr

6. Consideration to the sentiments of his subject is clear by his issuing of coins with legend in Bengali script in Assam.
7. The farman is published in the Journal of Assam Research Society Jan,-April 1942, PP. 1-12.
8. Memorial submitted to Chief Secretary for India by Jains in 1923.
9. Surendranath Sen, "The Shringeri Letters of Tipu Sultan" in Studies in Indian History, 1930, pp. 155-59; March, 1916, pp. 10-11; pp. 73-76
10. E.C. VI; 1977; PP.252
11. March, 1912; pp. 23, 40;1918, pp.22;1940, pp.26
12. E.C. Vol. VI, SR. 12,13; pp. 340.
13. Subbaraya Gupta, New light on Tipu Sultan, 1967,pp.121-125; Mohibbul Hasan, History of Tipu Sultan, 1917,pp.259-365; Wilks, Mark, op. Cit; pp. 592; Chetty A. Subbrarya "New Light on Tipu Sultan" in journal of Andhra Historical Research, Vols. VI and VIII, Uly 1931,1933, J.R. Henerson, The Coins of Haider Ali and tipu Sultan, 1921.
14. March, 1938, pp.123-25
15. E.C. VIII, Part II, N.R. 78, pp. 92.
16. Snit Chopra, Patriot, 7 August, 1988.
17. Ibid.
18. Ibid.

Is Islamic Law Out of Harmony with Contemporary Conditions?

On the basis of my comprehensive study of the Islamic law I maintain that the view declaring this law as incompatible with the demands of modern age is untenable, as it is not the result of research or logical reasoning. In fact academic research and logical arguments lead to the conclusion that Islamic law is specifically different from all human laws and is applicable to the conditions of every age.

There are two distinct groups of people who hold the view that the legal system of Islam is out of tune with the Zeitgeist. Of these the one has no knowledge of either the Islamic law or the modern law, while the other is acquainted with the modern law but knows nothing about the law of Islam. In other words both the groups are incompetent to make any comments on the

Islamic law as they are absolutely ignorant of if. You cannot obviously pass judgement on a thing which you are absolutely ignorant of.

In fact, the view that the Islamic law cannot meet the requirements of modern age is an erroneous assumption rather that the result of academic research. What the students are taught today is that there is no relationship between the modern legal system and the laws the were in force till the end of eighteenth century and the beginning of the nineteenth centuries and that the contents of modern legal system consist of modern legal system consist in philosophic doctrines and accepted canons of humanism and social life, of which the old laws are absolutely devoid. Comparison between the two legal systems have led them to believe that old laws are inapplicable in modern conditions. So far as the manmade laws are concerned, this is, of course, true. But they err in their judgment when they draw an analogy between the Islamic law and the man-made law. i.e when they think that inasmuch as all the laws which were in force till the end of the 18th century are out of tune with the Zeitgeist, the legal system of Islam too must be regarded as outdated since it was enforced during the middle ages and some of its elements remained effective down to the beginning of the 19th century. This line of argument involves a grievous fallacy that cannot escape the notice of a man of insight.

The Fallacy of Analogy between the Islamic Law and the Man-made Law

The springs of the error involved in this tenor of argument lie in the inability of the above groups of people to distinguish between the human and divine laws. They visualize the heaven in the image of the earth and the maker of man in the image of man. Evidently, no sensible person would consider it right to compare himself with the Creator of the universe and draw an analogy between the earth and the heaven. To sum up, these people do not differentiate between the divine law and the human law which are specifically different. However, the distinction between the two kinds of laws and their scopes will come into full relief as we consider the way they have evolved and discuss their respective nature and characteristics.

A False Syllogism

If it is true, then, that the human and Islamic laws are specifically and essentially different from each other, it will be a false syllogism according to the rules of logic, to draw a conclusion from premises denoting two unequal things of different orders.

The view that the Islamic law is outdated has originated from fallacious thinking. It has been assumed that the old man made laws are not in harmony with the zeitgeist and as the Islamic and human laws are not of the same order, the syllogism is false. False propositions proceed from false propositions.

We shall now discuss the evolution of the Islamic and customary laws, identify the causes of difference between them and explain this distinctive qualities. This discussion will bring home the specific difference between the two kinds of laws to those people also who cannot discern it. They will consequently realize that the Islamic law is characterized by certain basic qualities which are not to be found in the customary or conventional laws.

The Evolution of Customary Laws

The customary law, at the initial stage, is very weak and comes into being with an extremely limited number of rules. The society in which it comes into being codifies and enforces these rules. As the society rises in the scale of evaluating, its law develops correspondingly with a tempo proportional to the pace of social progress. As the needs of the society multiply and diversify, and as it is enriched with the wealth of thought, knowledge and manners, its scope progressively expands and its principles become more and more inclusive. In other-words customary law is born weak and feeble like a baby and then gradually grows and gets stronger till it attains maturity. As the tempo of social progress is accelerated, the development of law through various stages is correspondingly quickened and vice versa. In other words the society brings forth the law to fulfill its needs and regulate its life. But the law is always governed by the society and its progress is dependant upon social progress.

Hence the scholars trace the origin of human law to the emergence of the family and tribe. At this stage of corporate life, the word of the head of the family was a law to its members and the order of the tribal chief was binding on every individual belonging to the tribe. In this way the customary law developed with the growth of the society till the birth of the state. In the beginning, the ways of on family differed from those of another. Similarly the traditions of various tribes were not in harmony.

> "This day have I perfected your religion for you and completed my favor unto you and have chosen for you as religion Al-Islam."

This law is not meant exclusively for any particular community, nation or state. It is actually designed for the entire humanity including the Arabs as well as the non-Arabs the people of the East as well as of the West, however vast the difference may be between their mores and customer traditions and history. It is intended for every family tribe, community or state. In fact, it is such a universal and all embracing law that the legal experts have not been able to produce the like of it in spite of the fact that they have long been pondering over it.

The divine law of Islam is complete in every respect and there is nothing which it does not cover. It is all-inclusive and contains solution to any problems that may arise out of all sorts of circumstances. There is a provision in it for every possible situation. Besides, the Islamic law contains provisions relating to all the problems and affairs of all the individuals, communities and states as well.

It includes provisions regulating personal matters and individual problems as well as those of governments, states and social-political affairs. Thus it also deals with relations between nations both in peace and war.

It is also to be emphasized that the law of Islam was not revealed for application to the situation of a particular age or conditions prevailing at a certain period of history. It is meant for all times and is valid as long as man exists on earth.

Allah has made this law in such a way that temporal changes can make no impact upon it. It does not become antiquated or outdated. Its fundamental principles are invariable. It is applicable in all conditions because of its generality and dynamic character That is the reason why the need for its modification does not arise at all as it does in the case of ordinary man-made law.

What distinguishes the Islamic law from the ordinary law is that it has been revealed by Allah and His word is not emendable to change.

"There is no changing in the words of Allah." (10:64)

Allah knows the unknown. He is omnipotent and can lay down such rules for human beings that may be suited to every age. But the laws devised by man can fulfill only the needs of the time. Since man is ignorant of the unknown, the laws made by him cannot be applicable to unexpected, and unforeseen circumstances.

All the modern doctrines that the human law has been able to imbibe through ages of evolution were originally included in the Islamic law right from the very beginning. Although the man made conventional law of Islam, it has not been able to develop all those excellencies by which the Islamic Shariah was characterized the very day it was revealed. In other words the Shariah embodied in its original form all the sublime principles that the legal scholars so earnestly desire to be enforced today.

No Similarity between Islamic Law and the Man-made Conventional Law

In view of the manner in which the Islamic law has come into being and the way the human law has developed, we hold that there is no affinity between the two categories of law and that they are not two things of the same order capable of comparison. In fact, the nature of Islamic law is different from that of conventional law. Had the two been specifically identical, the original form of the Islamic law would not have remained intact. It would rather have been revealed in rudimentary form first and then developed along with the growth of society through various stage-it would not have contained the modern doctrines which the human law has been able to develop through ages. It would, as a matter of fact, have assimilated these doctrines thousand of years after they had already become a part and parcel of the communal law.

Having been acquainted with the historical backgrounds of Islamic and human law respectively, the readers can now easily grasp the numerous differences between the two and discern the distinguishing marks of the Islamic Shariah. They need no help to be able to identify the distinguishing characteristics of the two laws and pick out those of the Shariah. However, I deal here with some of the latter. A discussion of them will exclude the needs of explaining others.

Fundamental Difference between the Islamic Law and Human Law

The Islamic Shariah is different from the Human Law in these respects.

(i) Ordinary law is the creation of man, while the Shariah is divine revelation. Thus the two reflect the qualities of their respective makers. As the ordinary law is the result of human efforts it is imperfect, apologetic weak and inadequate. That is why it is constantly subject to change and modification- a process which we term as "evolution." As the society develops and reaches a stage unexpected and unforeseen, so also does does the customary law grows of assumes such forms as may not have been envisaged in advance. In other words the human law is imperfect in every respect and cannot attain perfection until man himself becomes perfect. But the truth of the matter is that he can only trace his past to a certain extent and is incapable of knowing the future.

The Islamic Shariah, on the contrary, has been made by Allah himself and reflects the Maker's perfection, glory and the light of omniscience which covers, in a sweep, all the possibilities of both the infinite past and the infinite future. The Omniscient Being has made the Islamic Shariah in such a manner that it embraces all the affairs and problems of the present and the future. The Almighty Allah has ordinate that there shall be no modification of His law since no change of time or space or the vicissitudes of human circumstances necessitate any amendment there-in:

"There is no changing in the words of Allah."[360]

What I have stated above, may be hardly credible to some people as they do not believe at all that Islamic law has been revealed by Allah. I care little for such people, although I want them to acknowledge the qualities of Islamic law I have alluded to. I will show that it abounds in such qualities. Those who deny the divine character of Islamic law should try to find to out why it is full of the virtues while other laws are absolutely devoid of. They should at the same time enquire as to who could be the maker of the Islamic Law. When I discuss the virtues while other laws are absolutely devoid of. They should at the same time enquire as to who could be the maker of the Islamic Law. When I discuss the virtues of this law, I shall give reasons for reasons for the fact that it has been made by Allah, the proof there of will be found everywhere in this book.

But the people, who do believe that this law is Allah's revelation will readily, acknowledge that it contains many a quality which is not to be found in human laws. They need no tangible proof believing in this; for, as the logical result of what they have accepted a priori, they will believe also that Shariah has many such qualities as mark it off from the man-made law.

The people who believe that none but Allah has created heaven and earth, caused the sun, the stars and the moon to move in the fathomless hollow of the universe, subjected the mountains, the air and the rivers to the principles laid down by Him, shaped the human features in embryo, created an eternal system for inanimate matter, plants and animals in which invariable order reigns, and which never calls for a change, do also believe that Almighty Allah has made certain invariable laws to govern the nature, movement and inter relations of things as well. These natural laws are so beautiful, marvelous and perfect that the human mind cannot even conceive of them. The people who believe in all this and also believe that Allah has made everything in this universe with consummate craftsmanship will, with full conviction, have faith in the fact that Allah has designed the Islamic law for all people and nations and governments. He has revealed it complete, invariable and impeccable so that it may remain eternally in force. This divine law is exquisite, wonderful and marvelous beyond human imagination.

---

[360] Al-Qura'n 10:64.

However, if any believer still wants logical proof of what I have asserted, he should wait a little along with the agnostics. The proof will be given at appropriate place. Nonetheless, it is quite possible that he may come across, the satisfying everywhere in these pages.

(ii) Customary law is the code of provisional rules which a society lays down to regulate its affairs and fulfill its needs. But these rules are not the forerunners of a society.

They rather emerge in the wake of a social set-up or are at the same level of development as the society. But with the passage of time they are outpaced by the society, inasmuch as the pace of social change is greater than the tempo of change in the customary law. Manmade law, in short, is a collection of provisional rules which are in harmony with the social needs of a particular period and no sooner the society undergoes a change than its laws are inevitably modified.

As opposed to the human law, the Islamic Shariah is code of rules which Allah has formulated to regulate the affairs of the human society at all times. It bears affinity to the human law since both the laws aim at the regulation of social affairs. But it differs from the latter because it is everlasting and is not amenable to change. Invariability, them, is the characteristic that is not found in any law other than the Islamic Shariah.

Two logical conditions are involved in this distinct aspect of Islamic law.

(a) The provisions and rules contained there in must be universal and so flexible that they could be applicable to all the problems arising in every age, in every phase of social development and in the ever-changing conditions of the society and could fulfill the multifarious social needs at all times.

(b) These provisions and rules must be so sublime and so highly developed that they never fall below the social standard at any time.

Both these qualities are to be found in the Islamic law to the highest degree. In fact, it is by virtue of these qualities that the Islamic Shariah is superior to all the mundane and other divine laws. The provisions and rules of the Islamic Shariah posses the qualities of flexibility and generality in the superlative degree and are at the same time so sublime and developed that man cannot imagine.

The Islamic Shariah was revealed thirteen hundred years ago. During these long centuries the human societies have been completely transformed. Man's ideas and modes of thinking have totally changed. Innumerable inventions have since been made and new disciplines and branches of knowledge have emerged. These are the things of which the ancients could not even dream of. The customary and the modern milieu with the result that there seems to be hardly any relationship between the modern law and the one in force at the time of the revelation of Islamic Shariah. Despite the constant process of change of which the conventional law has been subjected and despite the fact that Islamic Shariah, on the contrary, is immutable, the contents of the latter are for higher than the standards of human societies and are far more conducive to the solution of human problems than the modern law. Besides, it is much more in harmony with the human temperament and provides greater guarantee of peace and tranquility for humanity.

This was the historical proof of the superior qualities of the Islamic Shariah. Better evidence of it still is to be found in the Shariah itself. The following words of Allah may be cited in this connection:-

> "And whose Affairs are a matter of counsul." (42:38) Another proof is provided by a Tradition of the Holy Prophet (S.A.W.);-
>
> "Islam does not approve of inflicting harm on any body on one's own initiative nor does Islam deems it fit to do harm vindictively."

A consideration of the precepts contained in the Quranic verse and the Holy Prophet's saying quoted above will show how comprehensive, flexible and simple they are. There can be nothing more comprehensive, flexible and simple indeed. These precepts lay down consultation as a principle of government so as to prevent any harm either to the system or the individuals of the society. By virtue of this principle the Islamic law has proved to be too sublime for man to attain to its heights; for it makes incumbent upon individuals to consult one another in a manner that it is not harmful to anybody nor involves any attempt to inflict harm. I wish that this principle operates in the world today.

If we examine other precepts of the Islamic Shariah, we shall find similar qualities of comprehensiveness, sublimity and elasticity; or rather, whenever we come across a precept of the Islamic Shariah these characteristics are evident in it and we realized them at once. For example, let us take the following verse of the Holy Quran:-

> "Call unto the way of the Lord with wisdom and fair exhortation, and reason with them in the better way." (16:125)

This precept, flexible and universal as it is, contains the best principle - a principle that cannot be surpassed by anything discovered by men and the human intellect can't produce a better principle for the missionaries for calling the people to the right path. It enjoins upon them that they should propagate their message in a judicious manner and by giving good counsel and that they should have disputations for the purpose in the best manner.

Again, the following verses of the Holy Quran are to be carefully studied:

> "And no burdened soul can bear another's berden."
>
> (25:18)

> "Lo! Allah enjoineth justice and kindness, and giving to kinsfolk and forbiddeth lewdness and abomination and wickedness"
>
> (14:90)

> "Lo! Allah commandeth you that ye restore deposits to their owners and, if ye judge between mankind, that ye judge justly."
>
> (4:58)

> "And let not hatred of any people seduce you that ye deal not juslty. Deal justly, that is nearer to your duty.
>
> (5:8)

> "O ye who believe, be ye staunch in justice, witness for Allah, even though it be against yourselves or (your) parents or (your) kindred." (4:135)

As a result of a careful study of the above verses of the Holy Quran, the readers will realize how comprehensive and flexible are the precepts they embody. They are also sublime beyond human imagination.

(iii) The society frames a law and moulds it according to its customs, traditions and historical background. In other words, law is intended for the regulation of the affairs of the society and not for its guidance. The is why law cannot keep pace with social change, inasmuch as it is the product of the society and not the other way about.

The springs of human law lay in the process of social change right from the very beginning. But in the twentieth century particularly after the first world war this base of the human law began to undergo a radical change. The national states of contemporary world are champions of new movements and systems. The law is made to sub serve these movements and systems. The law is made to sub serve these movements and systems and thereby provide guidance to the society and be instrumental in the achievement of certain preset goals. Soviet Russia was probably the first to adopt this course followed by the modern Turkey of Kemal Ataturk. Fascist Italy and Nazi Germany Followed suit. Later other nationalist states adopted the same course. Consequently law in the present day world has assumed the dual role of regulating the social affairs on the one hand and provide on the other such guidance to the society as the people at the helm of affairs may deem fit in the collective interest.

As regard the Islamic Shariah we have allready seen that it is not the product of human society; nor is it subject to latter's development. It is the creation of Allah who has created every thing strong and steady.

The social pattern is indubitably the product of Shariah and vice versa; for the role of Islamic Shariah like that of original man-made law is not limited to mere regulation of social affairs. Its primary aim is to produce some righteous individuals, bring forth existence an ideal world. That is the reason why the provisions of the Shariah were loftier at the time of their revelation and continue to be loftier law contains principles and doctrines which the world has been able to arrive at after centuries of progress. It has other principles and doctrines that it has yet t attain to. Allah has made the Shariah a model of perfection and revealed it to His Prophet Muhammad (S.A.W.) so that mankind might obey him, try to imbibe cardinal virtues, elevate itself to the level of perfection and approximate to the standard determined by the Shariah.

The will of Allah was translated into reality and the Shariah served the end for which ti was revealed. It turned the grazers of camels into the rules of the world and the nomads of the desert into the teachers and leaders of the entire mankind.

The Shaiah continued to play its role as long as the Muslims acted thereon. When the Muslims of the earliest period strictly abode by it and lived up to its tenets, they rose to the level of world's leadership within a short span of twenty years in spite of their numerical insignificance. So great was their power and glory that no voice other than theirs was to be heard in the world and no slogan other than theirs was raised.

Obviously, it was Shariah which transformed them. It was Shariah alone which educated them, taught them morals and manners, softened their hearts, refined their modes of thinking, inculcated in them the sense of honor and goodness, enforced equality and created in them a passion for justice and taught them that they should co-operate with each other in matters of morality and righteousness. It prevented them from sins and excesses, enlightened their dark minds, delivered them from the shackles of lust and taught them that they are the best people on earth created for the sole purpose of disseminating virtues, checking vices and having unshakable faith in Allah.

The Muslims remained at the zenith of their glory so long as they adhered to Shariah. But when they threw it into oblivion and ceased to abide by its injunctions, their progress came to a standstill and they retrogressed into the same darkness of ignorance in which they had been wandering before embracing Islam with the result that they grew increasingly weaker and finally fell a prey to foreign domination. They had no power to resist any aggressive act committed against them.

Confronted with adversities, the Muslims in the contemporary word believe that the key to the progress of western world lies in its law and way of life. Hence they try to emulate the West. But this attempt has led them even farther away from the right path. It has aggravated their plight still further and doubly weakened them. In fact, by adopting the western system the Muslim nation has split up into groups and factions, each group boasting of what it has done. These Muslims are simply wasting their energies. They appear to be united overtly, but their hearts have fallen a prey to discord and dissension.

When Allah is willing to ameliorate the lot of Muslims, they shall believe once again they the Islamic law is impeccable and comprehensive; that it contains the golden principles of social progress for every age and that these principles are even superior to all the laws in force in the present age of advancement, in as much as it aims at establishing a righteous milieu in all conditions, leading it on the path of persistent progress and finally to the highest stage of perfection.

For a right thinking person the history of Muslims is replete with lessons. It tells us that it was Shariah alone which gave birth to the Muslims, raised them above all the nations of the world, them on the path of path of progress and thus enabled them to become the rules of the world. The history of Muslims also teachers that it is inevitable for their advancement and perfection to implement the Shariah again, as the Muslims owe their origin to it alone and their origin to it alone and their existence is subject to the existence of Shariah and is inseparable linked with it and that the key to their power lies in the power of Shariah alone.

Before passing on the next topic, I want to tell me readers that it is now only its present and final form that modern law has undergone a radical change and has assumed the role of guiding the society in addition to its original function. This new concept of its role has actually been derived from the Islamic shariah which, as its fundamental function, shapes and organizes the society as well as performs the task of guiding it. In other words the principle with which what Shariah began thirteen hundred years ago, has now been adopted by the modern law as a new of this doctrine. But their claim is totally false. They actually follow the Islamic Shariah.

The Essential Qualities of Islamic Law which distinguish it from other laws:-

Having indicated the fundamental difference between the Shariah and other laws, we now proceed to explain the essential qualities of the Shariah which mark it off from all the other laws. Now the points of difference the Shariah and the human law also constitute the basis on which the former is distinct from and superior to the latter. Hence, in view of the above difference it may be asserted that the Islamic law is different from and superior to other laws in respect of three qualities which are as follows

(a) Perfection

The Islamic Shariah is superior to other laws by virtue of its perfection. It contains all the rules, principles and doctrines required by a law to be complete and comprehensive. It is rich with all such rules and principles that may be of use to the fulfillment of human needs both in the near and remote future.

(b) Sublimity

The principles of Islamic Shariah always remain at a higher level than social standards. Whatever the degree to which the standards of human life may rise, the Shariah contains such principles and doctrines that will maintain its superiority over them and its standard will always be loftier than human standards.

(c) Permanence

The Islamic Shariah is immutable and everlasting and is characterized by permanence. Time does not affect its invariable provisions and yet it is suited to the conditions of all ages.

The fundamental characteristics of the Shariah mentioned above, notwithstanding their plurality and diversity, have emanated from one and the same source, and that is divine revelation. Had the Shariah not been revealed by Allah, it would never have possessed the qualities of perfection, sublimity and permanence, for they have been created by the Maker of the Universe. As opposed to the divine creation, man's work is devoid of these qualities.

The Proof of Above Qualities in Shariah

We have shown that the qualities which distinguish Shariah from other laws are perfection, sublimity and permanence. We shall now try to prove that it fully contains these qualities. The readers will learn in the sequel that these distinguishing marks are to be found in each and every principle, doctrine and provision of the Islamic Shariah. We will also acquaint our readers with such principles and doctrines that have only recently found their way into the Shariah modern law and also those that are unknown to it. We will show that the Islamic law, on the above qualities of the Shariah characterize each and every doctrine that we discuss in this book. When it is unquestionably established that the said qualities are to be found in the contents of the Shariah, no logical argumentation is needed.

The Doctrine of Equality

The Islamic Shariah contained, at the time of revelation, explicit injunctions that declared the principle of equality as mandatory. The mandate is, for instance, expressed in the following verse of the Holy Quran

> "O mankind ! Lo ! We have created you male and female and have made you nations and tribes that you may know one another. Lo! Allah is knower, Aware."

The Holy Prophet (S.A.W.) says the same thing in the following words:-

> "All men are equal like the teeth of a comb. The Arab is not superior to the Non-Arab except in righteousness." He enjoins the same thing in another Tradition "Allah has eradicated through Islam the arrogance of the days of ignorance and has put an end to their (the Quraish's) custom of taking pride in their ancestry: for all human beings are the descendents of Adam and Adam came into being from dust. Only the righteous person is superior among human beings."

Notice that the kind of equality enjoined by the above injunctions ins unconditional and unqualified equality that admits of no justification to discriminate in favor of one individual against another sex, one race or colour against another race or colour, a chieftain against a commoner and the ruler against the ruled.

The Quran tells us that the descent of all men is traceable to a single source and that they are born of one male and one female. If all men have descended from the same parents, the question of discriminating between man and man does not arise at all.

The Holy Prophet's Tradition makes it clear that the existence of all men is to be attributed to one person and that they have sprung from dust. Hence all men are equal like the teeth of a comb. As no one tooth stands above the other teeth, so also no man is born higher than others.

The holy Prophet (S.A.W.) to whom the doctrine of equality was revealed lived among a people whose way of life and pattern of society was rooted in the concept of social disparities. They boasted of their wealth and material possessions, of their patriarchal and matriarchal descent, of their sex and tribes. It cannot, therefore, be maintained that the pattern of collective life and social?.. Of the time necessitated the emergence of the doctrine of equality. This doctrine actually came into existence at that stage in order to raise the standard of society and set it on the path of progress. It real purposes, however, was to enrich the Shariah with the requisite principles and doctrines of perfection so that it may be thorough and comprehensive for all times. The fact that the text of the above injunctions possesses the qualities of generality and flexibility cannot be called in question in any circumstances. Whatever the change that may come about in time, space and people's circumstances, these injunctions will never be wanting in a solution to any problem caused by the changed conditions. The provisions of Islamic law have been devised in consideration of the permanent character of the Shariah that does not admit of any modification or amendment. Its provisions have, therefore, been made so flexible that the need for any change of modification does not arise at all.

The doctrine of equality which Islam presented thirteen hundred years ago was accessible to the modern law only as late as the closing year 18th and the beginning of the 19th century. In other words the Islamic Shariah preceded the modern law by eleven centuries. The latter, obviously, has by its reaffirmation of the doctrine of equality, not discovered of devised any new principle. It has actually followwed and benefitted from the Islamic Shariah. The readers will notice in the sequel that the modern law provides for a very limited scope of the application of the said doctrine where-as according to Shariah there is no limit to its application.[361]

Equality between Man and Woman

This, as a matter of fact, is a corollary from or an applied case of the doctrine of equality. We have however preferred to discuss it under a separate section partly because of its special significance and partly because it is indicative of sublimity and correctness of Shariah as well as of its indicative of sublimity and correctness of Shariah as well as of its wisdom of determining rights and duties of men and women their respective rights and duties in a mechanical fashion, but applies the principle of assignment in such a way that all its advantages are ensured while all the disadvantages are guarded against.

One of the general principles of Islamic Shariah is that the rights and duties of women are equal to those of men. Hence the rights and duties of men and women are identical. Women have been assigned certain duties towards men as against the duties of men towards women. Thus just as men have certain obligations to fulfill in respect of women, so also have the latter certain obligations towards men. This is explicitly stated in the following words of Allah.

---

[361] We have dwelt at length on the doctrine of equality in our chapter "on the application of law to personal cases." Here it has just been touched upon as the main subject under discussion at present is the principles as doctrines that constitute the distinguishing characteristic of Islamic Law.

> "And they (Women) have rights similar to those (of men) over them in kindness" (2:228)

> Having laid down this general principle of equality between man and woman, the Shariah allows, men a degree of superiority over women. "And men are degree above them (Women)".

The Holy Quran has, at the same time, delimited the extent of man's superiority:

> "Men are in charge of women because Allah has made one of them to excel the other and because the because they spend of property (for the support of women).

In short, man's status, as determined by Islam, is one of ruler and superior in common matters. Doubtless, it is man according to Shariah, who is responsible for bearing the expenses of women and providing proper training and education to children. Obviously the person charged with these primary responsibilities in the family mush have the status of ruler and whose word, in the family matters, must be treated as final.

The power conferred on man is commensurate with his responsibilities so that he might be able to discharge them in a better way. This is the applied aspect of a general principle of Shariah according to which power is proportional responsibilities. In accordance with this principle the Shariah determines the relationship between the persons wielding power and other people and has also laid down the limits of their power and responsibility. They are clearly presented in the following Tradition of the Holy Prophet (S.A.W.).

> "Everyone of you is the chief who shall be accountable for his charge. The priest is the chief responsible for those in his charge. Man is the guardian of his family and shall have to account for his charge. Similarly the woman is the supervisor of her husband's house and shall be responsible for her charge."

Although man has an edge over woman in common matters, yet man has no power to interfere and dictate in the affairs that are closely preserved for the woman. In fact the woman can exercise her exclusive rights as she likes and turn them to account at will without interference of man whether he be her husband or father.

The principle of equality between man and woman was laid down by Shariah thirteen hundred years ago at a time when the world was no prepared for treating man and woman on equal footing in respect of rights and duties. Hence it will be wrong to say that this equality was necessitated by the social needs of the time. The real motive behind it was the necessity to make the Shariah perfect enriching it with all those principles and doctrines that were essential for its comprehensiveness.

The sublimity of Islamic law as evident from its provision for equality between man and woman can best be judged by the fact that this principle of equality was recognized by the modern laws as late as the 19th century. Some of these laws do not, even to this day, allow the woman to act independently in the exclusive realm of her own affairs without consulting her husband.

It is easy to evaluate the injunctions of the Quran and Sunnah under discussion because of their generality and flexibility. They are not wanting in any conceivable case of application and are capable of solving all possible problems. Again, they are characterized by sublimity and perfection to such a degree that we shall be justified in maintaining that the provision of Islmaic Shariah is not amenable to change and modification, simply because they need not change and modification.

Doctrine of liberty

One of the fundamental principles of the Sariah is the doctrine of liberty. The Shariah has affirmed liberty in its best forms, guaranteeing the freedom of thought, belief and expression. Let us discuss these freedoms one by one.

Freedom of Thought

By affirming the freedom of thought the Shariah has delivered man from the shackles of superstitions, myths, traditions and habits. It enjoins that man should give up everything that does not appeal to reason. It tells us that it is absolutely essential to give a careful thought to everything that does not appeal to reason. It tells us that it is absolutely essential to give a careful thought to everything, judge all things by the standard of reason and accept only what reason acknowledges and reject all that it disapproves. The Shariah does not allow us to accept or say anything without thinking over it.

They very message of Islam is grounded in reason. In its affirmation of the message of Islam is grounded in reason. It its affirmation of the existence of Allah, in its call to Islam and insistence on belief in the Prophet and the Holy Book, the Quran in the main, concentrates on teaching the people to think and contemplate and on trying to awaken their reason, and adopt all possible methods for persuading them to reflect own creation and over the existence of all crated things and all the sensible phenomena so that they may know Allah and be able to distinguish between good and evil.

There are innumerable verses in the Holy Quran in which the principle of freedom of thought has been expounded and the use of reason emphasized. The following verses may be cited in this connection:-

> "Lo! In the creation of the heavens and the earth, and the difference of night and day, and the ships which run upon the sea with that which is of use of men and the water which Allah sanded down from the sky, thereby reviving the earth after its death, and dispensing all kinds of beasts therein and (in) the ordinance of the winds, and the clouds obedient between heaven and earth are signs (of Allah's sovereignty) for people who have sense". (2:164)
>
> "Say (unto them, O Muhammad): I exhort you unto one thing only: that ye awake Allah's sake, by Twos and singly, and then reflect." (34:46)
>
> "Have they not pondered upon themselves? Allah created not the heavens and earth, and that which is between them, save with truth and for a destined end." (30:8)
>
> "Say: Behold what is in the havens and the earth!" (10:102)
>
> "So let man consider from what he is created. He is created from a gushing fluid. That issues from the loins and ribs." (10:102)
>
> "So let man consider from what he is created. He is created from a gushing fluid. That issues from the loins and ribs." (84:5-7)
>
> "Will they not regard the camels how they are created? And the haven, how it is raised? And the hills, how they are set up? And the

> earth, how it is spread?"
> (88:17-20)
>
> "Lo! Therein verily is a reminder for him who hath a heart, of gives ear with full intelligence." (50:37)
>
> "But only men of understanding really head." (3:7)

The Quran warns the people against suspension of their faculty of reason, keeping it indolent and following others blindfold; against superstitions and belief in myths, and against in deliberate adherence to traditions and customs. If they behave in this manner, they will hardly be different from or become even worse than animals, for they would then be following others without deliberation and without allowing their reason to sit in judgment at their words and deeds. Reason is the only faculty bestowed by Allah on man that marks him off from animals. If he allows this faculty to remain inert and gives up thinking, he will become an animal or even worse.

> "And when it is said unto them. Follow that which Allah has revealed they say: We follow that wherein we found our fore father. What! Even though their fore fathers were wholly unintelligent and had no guidance? The likeness of those who believe (in relation to the messenger) is as thickness of those who called until that which hearth naught except a shout and cry. Deaf dumb, blind, therefore they have no sense." (2:170-171)
>
> "Have they not travelled in the land, and have they hearts wherewith to feel and ears wherewith to hear? For indeed it is not the eyes that grow blind." (22:47)
>
> "Already have we urged into hell many of the jinn and humankind, having hearts wherewith they understand not, and having eyes wherewith they see not, and having ears wherewith they hear not. These are the best-nay, but they are worse! They are the neglectful."

Man may think of anything and may adopt any mode of thinking he chooses. He cannot be censured for his thought, even if he thinks of those acts prohibited by the Shariah; for the Shaiah does not censure the mind and does not call anyone to account for thinking of any unlawful word or deed. A person is taken to account only when an unlawful word has been. A person is taken to account only when an unlawful word or deed. A person is taken to account only when an unlawful word has been said or an unlawful act has been committed by hum. The Prophet (S.A.W.) says the same thing in the following words:-

> "Allah has forgiven my Ummah for any idea that may come into its mind so long as it does not act upon such an idea or utters it."

Freedom of Belief

The Islamic Shariah is the first law in the history of the world to guarantee the freedom of belief. It does not only guarantee this freedom but also goes further to protect and lend it maximum support. According to Shariah every individual is at liberty to hold any belief or religious opinion he chooses and nobody is allowed to compel him to renounce his belief, religious opinion accept some other belief or prohibit him to express his religious opinion.

But the Shariah is a practical law. It does not stop at merely declaring the declaring the freedom of belief. It clearly lays down the procedure to protect it. This consist of two methods:

(1) It is incumbent upon every individual to respect another individual's right to belief as well as action thereon. No person can coerce another person into accepting any particular faith or renouncing his or her faith. If his belief is 'at variance with that of the latter, he should try to convince him by persuasion, making him realize the error involved in his belief. If he is convinced and willingly renounces his belief, well and good. But he does not acknowledge the error, it is not permissible to coerce him, nor is it in any way justified to exercise one's influence so as to force him to give up his religion. It is enough for discharging one's duty to explain the error inherent in the belief of a person professing a different religion. Having this done, one has shown him the right way and guided him to right path. One can find injunctions to this effect in the Holy Quran.

> "There is no compulsion in religion". (2:256)
>
> "And if thy Lord willed, all who are on the earth would have believed together. Wouldst thou (Muhammad) compel men, until they are believers?"
> (10:100)
>
> "Remind them, for thou art but a remembrance' Thou art not at all ward over them" (89:21-22)
>
> "But the messenger has no other charge than to convey the message plainly." (24:54)

(2) It has been enjoined upon the believer himself that he should guard his faith and strive to champion it. He should refrain from adopt a negative attitude in this respect. If he finds that he is no longer able to defend and champion his faith, he should migrate from the place where his faith is not respected to a place where it is respected and where he is allowed the opportunity to profess it above board. If a believer has the strength to migrate but he does not do so, he is doing a wrong to himself even before he is oppressed by the person with a different belief. Such a believer is also guilty of a great sin, for which he deserves to be punished. But Allah does not overburden a man who does not have the strength to migrate. The following verses of the Holy Quran elucidates this point.

> "Lo as for those whom the angles take (in death) while they wrong themselves, (the angles) will ask : In what were ye engaged? They will say: we were oppressed in the land (The angles) will say: Was not Allah's earth spacious that they could have migrated therein? As for such, their habitation will be hell, an evil journey's end".

Except the feeble among men, and the women, and the children, who are unable to devise a plan and are not shown a way.

> As for such, it may be that Allah will pardon them. Allah is ever clement, for giving. (IV:97-99)

By guaranteeing the freedo1m of belief to all the people including the Muslims and the non-Muslims the Shariah has exhibited the highest degree of sublimity. It thas given the non Muslim citizens of an Islamic state the right to profess lather, religion and express their belief, openly perform their religious rites, keep their religion. Take for example, the jews. They were allowed by the Islamic states complete freedom to their synagogues and to worship according to their custom. They also had their schools in which the religion of Moses was freely taught. Again they were liberty to write about their religion and try to prove its superiority over other Systems of belief by comparing it with the latter within the limits of propriety and morality and without prejudice to the peace and tranquility of the State. The Christian scholars representing various schools of thought were also allowed similar freedom. Every Christian sect had its churches and, schools in the Islamic State were its members freely worshipped and taught creed freely. Besides, they wrote and published books on their religion without any interference.

Freedom of Speech

The Islamic Shariah does not merely provide for freedom of expression. It recognizes this freedom as the right of every individual. It goes even a step further and declares the freedom of speech as an obligation with respect to morality, common weal, institutional matters and prtion of evils.

Allah says in the Holy Quran:-

> "And there may spring from you a nation who invite to goodness and enjoin right conduct and forbid indecency."
> (3:104)

> Those who, if we give them power in the land, establish and enjoin kindness and forbid inequity."
> (22:41)

The Holy Prophet has taught the same thing in the following Traditions:-

> "If any one of you sees an evil, he should rub it out with his own hands. If he does not have the strength to do this he should verbally denounce it. But if he is unable to do even this much, them he should deem it vicious at heart and this is the nadir of the weakness of one's faith."

Again,

> "To speak the truth in the face of a tyrant is the best form of jihad (Crusade).

There is yet another tradition of the Holy Prophet which runs as follows:-

"Faith consists in exhortation and goodwill."

"O Prophet of Allah," asked his companions, "for whom do you mean?"

The Prophet replied, "For Allah, for His Prophet, for His book, for the leaders of Muslims as well as the Muslim people in general."

The Prophet has said in another Tradition, "Hamza bin Abdul Muttalib is the leader of martyrs. He was the man who enjoined upon a tyrant to do good and forbade him to do evil. He was punished with death for committing this crime."

Although every individual has the right to speak or use his pen in defense of his faith, but this right does not constitute unqualified freedom. One can exercise this right only within the limits of social decorum and morality and on condition that it is not repugnant to the injunctions of Shariah.

The Islamic Shariah affirmed the freedom of speech and writing right at the time of its revelation, imposing simultaneously such restrictions of the exercise of this right as guarantee safeguards against encroachment on these rights or against the abuse of the freedom of speech. The Prophet of Islam was the first to have announced this freedom and to have called the people to make use of it. But he was at the same time the first person on whose freedom of expression restrictions were imposed. It was necessary to restrict his freedom because his word and deed were to serve as model for humanity. It was also necessary to make the people realize that the prophet himself, not to speak of ordinary men, did not enjoy unrestricted freedom of expression notwithstanding the fact that Allah says of him:

> "And most surely you conform (yourself) to sublime morality".
> (68:4)

Allah commanded the Holy Prophet (S.A.W.) to convey his message to the people, persuade them to believe in his prophethood, and, by disputation, try to goad the disbeliever's reason and awaken their hearts. Nevertheless, the Prophet was not allowed unqualified freedom of expression. On the contrary a procedure was laid down for him for inviting the people to the path of Allah and for disputation with the disbelievers. It was made incumbent upon him to carry out his mission judiciously with good counsel, converse with them in the best possible manner to shun stupid people, refrain from saying anything indecent, and from reproaching the people worshipping false possible manner to shun stupid people, refrain from saying anything indecent and from reproaching the people worshiping false gods. These were the restrictions imposed by Allah upon the Holy Prophet's freedom of speech. It was made clear to him that this freedom was not absolute. The condition under which such freedom is provided for in the Shariah is that it should not be misused or should not be used in a manner which may offend others.

These restrictions imposed on the freedom of expression benefits all the individuals and nations, pave the way for progress, and generate the fraternity and love. It also engenders and fosters the atmosphere of confidence among individuals and institutions, brings about a consensus on truth among the leaders, inducing them to cooperate with one another. Consequently personal and factional slogans are done away with. This is the kind of atmosphere lacking in modern age and the world is striving in vain to find ways and means to create it.

The comprehensive character of the principle of Shariah pertaining to the freedom of expression may well be judged from the fact that modern legal experts are divided into two groups in spite of their long experience. One of these groups favors unqualified freedom of expression with a few restrictions in the field of general administration only. But it attaches no importance to morality. This begets only hatred, animosity, and factionalism leading to social disorder and anarchy. The other group favors imposition of restrictions on any opinion that is at variance with the position held by those in power. If this idea is put into practice, it will repress freedom of thought and expression and virtuous people would be kept away from government affairs. This would give raise to dictatorship, social unrest and revolutions.

The Islamic Shariah is opposed to the concepts of both license and a complete denial of liberties which are dominant in modern states. Islam basically advocates freedom of expression. But it imposes at the same time certain restrictions thereon in order to safeguard morality, social propriety, and smooth running of general administration: for, without these restrictions, freedom of expression cannot produce the desired results. The individual enjoying this freedom can be prevented from giving offence to others only when they are restrained fro saying anything that may prejudice morality, social decorum, and maintenance of law and order. Obviously nobody can have a right to transgression and offence, the denial of which might be tantamount to depriving him fo something he is entitled to.

Doubtless, the Islamic Shariah allows every citizen to say anything without transgressing the prescribed limits; that is, a citizen should abstain from vituperation, defamation, and calumniation and from telling lies. He should rather try to rally the people round himself with prudence and good counsels. He should talk to them politely, refrain from uttering anything evil, and avoid stupid persons. The people will naturally lend ear to what a person adhering to the above principles has to say and attach due importance to it. Another advantage of the restrictions on the freedom of expression is that the person observing them will have good relations with other people and the community, as a whole, will be able to carry on the task of promoting common welfare effectively.

The following verses of Holy Quran constitute the charter of the freedom of expression:

> "Call unto the way of thy lord with wisdom and fair exhortation and reason with them in the better way"
>
> (16:125)

> "Keep to forgiveness (O Muhammad) and enjoin kindness, and turn away from the ignorant."
>
> (8:199)
>
> "When the foolish one's address them (they) answer peace."
> (25:63)
>
> "Revile not those unto whom they pray beside Allah lest they wrongfully revile Allah through ignorance."
>
> (6:109)
>
> "Allah loved not he utterance of harsh speech save by one who hath been wronged." (4:148)
>
> "And argue not with the people of the scripture unless it be in (a way) that is better, save with such of them as do wrong."
> (29:46)

There were the three aspects of the freedom of expression which the Islamic Shariah presented at a time when the people's beyond their ancestors' practice. They naturally resented any change in their beliefs on account of their outlook on life. Only the powerful people and those in authority among them enjoyed freedom of expression and thought. That was why the Muslims of the earliest period had to face great difficulties and persecuted in their missionary work. They were brutally tortured for changing their belief and were compelled by every brutally tortured for changing their belief and were compelled by every possible means to abandon their new faith. The heathens lost no opportunity to perpetuate atrocities on the Muslims. Whenever the Muslims spoke to propagate their faith, they were silenced and no sooner they stood up to offer their prayers than their watchdogs busied themselves to torture them.

From what has been stated above, it will be seen that expounding the principle of freedom of expression did not keep abreast with the process of social evolution as it did not care to fulfill the needs of the society at the stage of development, for this principle was not acceptable to the world then. The Shariah provided for this freedom so that the society might be set on the path of progress, the people lifted from the abyss of ignorance and depravity and above all, the Shariah itself might attain to perfection and become in-variable and perpetually applicable.

The provisions of Shariah with respect to individual liberty they need no change or modification, for the Shariah in itself does not admit of any amendment. All its injunctions are general and flexible enough to withstand the test of time in all circumstances.

The Islamic Shariah affirmed the doctrine of individual liberty eleven centuries before the modern law; for it was introduced into the latter as late as at the end of the eighteenth and beginning of the nineteenth centuries. Before that the concept of liberty was unknown to the man-made law. The thinkers and reformers in the west and those who dared to criticize the official religion were severely punished. This is a historical fact. Viewed in the light of history, the claim that Europe was the first to champion individual freedom would turn out the be utter falsehood. This utterly false claim is based on the ignorance of Shariah which may be condoned in the vase of westerners. But how can we escape the charge of subscribing to it?

The Doctrine of Consultation

The principle of consultation as provided for in the Shariah has been laid down in the following verses of the Holy Quran.

وَشَاوِرْهُمْ فِي الْأَمْرِ

"(And those) whose affairs are a matter of counsel."

(42:38)

وَأَمْرُهُمْ شُورَىٰ بَيْنَهُمْ

"And consult with them upon the conduct of affairs"

(3:159)

The assertion of the principle of consultation was not a reaction to the conditions prevailing in the society, since Arabs were overwhelmed by pagan ignorance and fallen to the lowest degree of backwardness. The Islamic Shariah was the first to provide for the doctrine of consultation as it was essential for a law to be perfect, permanent and invariable Again, provision for such a doctrine was necessary as it was conducive to social progress, demanded careful consideration of general problems, accustomed the people to attach due importance to their problems and taught them to keep in view the future of the Ummah, to ensure the people's participation in the affairs of the government and to have an eye on their rulers and their conduct. In short, the doctrine of consultation is essential for the perfection of the Shariah itself as well as for the guidance of the society and raising its social standard.

The two verses of the Holy Quran quoted above in the context of the principle of consultation are characterized by generality and flexibility to such a degree that it will never be amenable to modification. This explains our earlier observation that the Islamic Shariah is everlasting, immutable and never in want of amendment.

It is for this reason that having laid down the general principle of consultation, the Shariah has not left the framing of the rules of its execution to the discretion of the people in power; for such rules must, of necessity, very with places, societies and time. The people holding the reins of government may ascertain the will of the people through the elders of tribes and heads of families, or find out by a direct or indirect vote the opinion of individuals fulfilling certain conditions laid down for the purpose; mandate, which they may deem fit and which does not prejudice the interests of any individual or pose a threat to the interests of individuals or community as a whole or to the smooth running of general administration.

However, the Shariah has prescribed certain basic rules for the enforcement and application of the doctrine of consultation, instead of leaving them to the discretion of the rulers. These basic rules, like the fundamental doctrine do not admit of modification or change because they have been clarified in the relevant injunctions of the Quran and the traditions of Holy Prophet (S.A.W.). The general principle is that any rules explained in such injunctions need no modification. One of the basic rules pertaining to the enforcement and application of the concept of consultation and declared as binding by the Shariah take the initiative in the enforcement of majority's mandate and treating it as binding should carry it out in all sincerity and defend it in the same spirit as the majority itself would do. Besides once an issue has been thoroughly considered and discussed, the minority, according to general principle referred to above, has no right to criticize the decision made by the majority or to call it into question at the time of its enforcement. This was the practice of the Holy Prophet (S.A.W.) and ought to be followed by all Muslims in compliance with Allah's command.

> "And whatsoever the messenger give you, take it, and whatsoever he for bidet, abstain (from it)."

The Holy Prophet himself gave the lead in translating the above basic rule into action and his practice was subsequently followed by his companions.

On the occasion of the Battle of Uhud, the Holy Prophet (S.A.W.) came to know that the forces of Quraish had already reached Madina and encamped on the side of the Mount Uhud near the town. The Prophet called a meeting of his companions to decide whether the Muslims should move out of the town to meet the enemy or fortify themselves within the town itself. The Prophet himself was of the opinion that they should preferably take up their positions inside the town and the disbelievers should be attacked at the approaches to the town, should they try to penetrate into it, while the womenfolk should fight from the top of their roofs. Some of his companions as well as Abdullah bin Ubaiy concurred as well as Abdullah bin Ubaiy concurred with the Prophet. But a majority of his companions preferred to give a battle to the enemy outside the town. On this occasion the Prophet was the first to enforce the decision of the majority. The Prophet was the first to enforce the decision of the majority. The Apostle of Allah left the meeting, went home, and returned with his arms ready to fight. He then led both the majority and minority parties out of the town to meet the enemy. Thus he put into effect the decision of the majority, notwithstanding his own opinion was to the contrary. But subsequent developments proved that his own opinion was right and must have been translated into action.

This practice of the Prophet (S.A.W.) was followed by his companions in the battle against the apostates. A majority of the companions expressed the view that peace was preferable to war against the apostates. But the first Caliph Hazrat Abu Bakr (R.A.A.) together with a few Companions of the Prophet was in favor of war and adopting a hard line against them. However when the issue was discussed, most of the companions were satisfied with the caliph's verdict and thus he had the support of the majority in the final analysis. When Hazrat Abu Bakr decided to give effect to his verdict, the very people who were opposed to it, were the first to offer their lives and property to get it enforced.

This sacred practice, which is a complement of the principle of consultation, is only effective remedy for the failure of modern democracy. It has been widely acknowledged that the democratic. States have utterly failed in the enforcement of the principle of consultation. The basic cause of their failure is that the individuals in these States are allowed the right to keep on criticizing a decision of the majority after the conclusion during the phase of its implementation, belittling its importance thereby. In fact, they enjoy the right of criticism even after the enforcement of a mndate, presenting it as something ridiculous.

Under a democratic constitution the functions of government are entrusted to the majority are untenable and worthless and are therefore, not duly respected. The part in minority goes to the extent of evading the law enforced by the majority goes to the extent of evading the law enforced by the majority goes to the extent of evading the law enforced by the majority party. This state of power. Now the views of a party in power are constantly subjected to criticism, decision, and question.

Criticism is, no doubt, the best means of improvement in democratic process, but does good only at the deliberative stage and prior to the implementation of the majority' decision. But when the decision once enters the stage of implementation or execution, its criticism will cause only dissension. In fact criticism at this stage would be incompatible with the basic tenet of the doctrine of consultation, under which the masses are to be governed in accordance with the verdict of majority. In other words the consensus of the majority should be respected and treated as binding on all the individuals.

As a logical and natural result of the critical attitude of the minority towards the majority is that the people in power in the democratic countries are driven into a corner so much so that they are incapable of doing anything properly. The people consequently lose confidence in their leaders and parties. They are no longer confident that leaders are capable of leading the people and looking after them in a better way. This is but quite natural, inasmuch as the men elected by them pay little heed to what they have to say.

Although the people's loss of confidence in the leadership is the main cause of failure on the part of democratic states in the application of the principles of consultation, the people have come to believe that the very principle of consolation is totally impracticable. In other words, loss of confidence in the people responsible for the enforcement of the principle of consultation is totally impracticable. In other words, loss of confidence in the people responsible for the enforcement of the principle is transferred to the principle itself. Consequently, countries having democracy abandoned democratic system and sought to atone for its failure in dictatorship.

But the experience of dictatorship has shown that this system has received even more setback that democracy; for in the dictatorial system, people are deprived of the freedom of speech and thought and the right to have a government of their choice; the government losses contact with the masses and both the government and the people are confronted with inconceivable difficulties and intricate problems, and the entire nation has to bear the brunt of the consequences of dictatorship in the final analysis. When dictatorship replaces democracy it appears to be successful. But the credit of its success does not go to the dictatorial system itself. Its real cause is that the people feed up with democracy repose their confidence in dictators and demonstrate their support for them. The dictators too, on their part, want to do something for the benefit of the people. But when these trustworthy fellows are replaced or fail to achieve the objectives of their programmers, their relation with the people is at once cut off. This state of affairs results in the deterioration of the dictatorial system which is indicative of a change of government in the offing. However, the actual change comes about when the hold of the rules on administration is weakened or the people get the better of them and have the courage to en –counter them defiantly.

The real basis of democracy is consultation and cooperation. But owing to the misapplication of the principle of consultation in it the governors are swayed by the governed and there is complete lack of co-operation between the two classes. Dictatorship, on the other hand, rests on obedience and an atmosphere of mutual confidence between governors and the governed. But owing to the abuse of dictatorial system the governed. But owing to the abuse of dictatorial system the governed are completely subdued by the governors and they distrust each other. The essence of Islamic system, as opposed to both democracy and dictatorship, is consultation when it is needed and cooperation and obedience when the verdict of majority is being enforced. Besides, the rules of Islam do not admit of the domination of the rulers by the ruled or the other way round. Thus the Islamic Order is absolutely free form the vices of dictatorship and abounds in all the virtues of both take together.

The Islamic Shairah, by virtue of its provision relating to consultation, has been eleven centuries ahead of the modern law in which this principle was incorporated only in the wake of French Revolution. England, of course, is an exception, where it was introduced in the seventeenth century. And in the U.S.A the principle of consultation was provided for as late as the later half of the eighteenth century. Subsequently, the principle of consultation was universally acknowledged and in the following century, most of the laws of the western world comprehended it. At any rate, it is evident that by reaffirming the principle of consultation, modern law has not presented any new doctrine, but has accepted what Islamic Shariah in the seventh century.

Limiting the powers of the governing authority

The Islamic Shariah was the first to impose limitations on authority and to restrict the exercise of power by the people in authority. It makes them accountable for their faults and transgressions.

This concept of the limitation of authority is grounded in the following principles:

1) Limitation on Authority.

2) Accountability of people in power for their faults and transgression.

3) The right of community to remove any person in Authority.

Principle No.1: Limitations of Ruler's Powers

Before the advent of Islam the people in authority enjoyed absolute and unlimited power. The relationship between the ruler absolute an unlimited power. The relationship between the ruler and the ruled was based on might and strength. The degree and extent or power which the former enjoyed was proportional to his might. As he grew weaker his power correspondingly diminished and deteriorated. The people did not obey the ruler in his capacity as their ruler but because he was mightier and more powerful. Hence as long as the ruler could drive the people with his scepter and kept them subdued with them subdued with his impressive personality and wealth, the people remained obedient him, the people naturally became his subjects. In those days common people were regarded as thralls and servants of the man wielding power, regardless of the fact whether he inherited it or seized it by force.

When a ruler came to power by dint of force and strength, his authority was absolute and unrivalled. He had the license to do anything with impunity.

The Islamic Shariah replaced all such antiquated values by those that behaved human dignity and fulfilled collective needs. Islamic re-established the relationship between the rulers and the ruled on the basis of collective interest, bestowed on the society the right to appoint such rulers as could work to safeguard, and to promote its interest. It also imposed limitations on authority, and made it obligatory for the rulers to abide by them. In case any ruler violated these limitations, the community had the right to remove him and elect in his place another person, capable of running its affairs and look after its interests.

The Islamic Shariah has laid down both the rights and obligations of the ruler in detail. According to the Shariah the main responsibility of the ruler is to guard the faith of Allah, and act as vicegerent of His apostle in political affairs. The jurist use the term Imam for the ruler.

According to the jurists of Islam the Office of the Imam or Caliph comes into being on the basis of a contract concluded by mutual consent and free choice[362]. According to this contract the Imam Duty bounds[363] to look after all internal and external affairs of the Ummah or the community in this respect must be performed within the limits, prescribed by Allah and His Apostle. As against the duty assigned to the Imam, the Ummah is charged with the responsibility to obey and follow him as long as he adheres to the limits laid down by Allah. If the Imam deteriorates morally, or is no longer capable of discharging his duty directly, he shall be removed.

---

[362] Al Ahkam-ul Sultania, p6,

[363] The Author of Al Ahkam-ul-Sultania has adumbrated the functions of the Imam as follows :-

To sum up, the Imam in Islam does not enjoy unlimited powers and does not have the license to commit or omit whatever he likes. He is an individual of the community chosen to lead it. The community imposes certain obligations, and confers certain rights on him. He enjoys powers only accordingly as he fulfils his obligations and exercises his rights. It is incumbent on him not do anything repugnant to the spirit of the Shariah, as is enjoined by the Quran:

وَأَنِ ٱحْكُم بَيْنَهُم بِمَآ أَنزَلَ ٱللَّهُ

"So judge between them by that which Allah has revealed."
(5:49)

ثُمَّ جَعَلْنَٰكَ عَلَىٰ شَرِيعَةٍ مِّنَ ٱلْأَمْرِ فَٱتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَآءَ ٱلَّذِينَ
لَا يَعْلَمُونَ ﴿١٨﴾

"And we have set the "(O Muhammad) on a clear road of (Our) commandment; so follow it; and follow not the whims of those who know not." (45:18)

وَلْيَحْكُمْ أَهْلُ ٱلْإِنجِيلِ بِمَآ أَنزَلَ ٱللَّهُ فِيهِ ۚ وَمَن لَّمْ يَحْكُم بِمَآ أَنزَلَ
ٱللَّهُ فَأُو۟لَٰٓئِكَ هُمُ ٱلْفَٰسِقُونَ ﴿٤٧﴾

"Whoso judged not by that which Allah hath revealed; such are disbeliever" (5:47)

By Making the injunctions of the Shariah binding on the Imam it is meant that his powers have been restricted to the bounds of the Shariah that and is

---

(a) Protection of Faith (b)Creation of Peaceful conditions (c)Establishment of order (d) Enforcements of punishments (e) Exaction of injunctions (f)Defense of Promoters (g) jihad (h) Collection of taxes (i) Looking after people's property in the event of disturbances (j)Supervision of Officers charged with these duties.

ineffective beyond that jurisdiction and that what is lawful for the community is also lawful for the Imam and whatever other individuals are denied the Imam us also forbidden.

Principle No. 2: Concept of Ruler's Accountability for his Transgressions and faults

Having outline the duties and responsibilities of the Imam and delimited the extent of his powers, the Shariah proceeds to make him accountable for aught he does beyond his jurisdiction whether he does it intentionally. The Islamic concept of the ruler's responsibilities is a logical and natural result of his position determined by the Islamic Law. The Shariah as we have seen has laid down the rights and obligation of the ruler and made it incumbent upon him to refrain from overstepping his lawful limits. It does not allow him any special privilege but treats him at par with an ordinary citizen of the State. Hence justice and equality demands that the ruler should be called to account for anything he does in violation of the Shariah just as every citizen has to account for an unlawful act, whether done intentionally or negligently. When we take up the point that the provisions of Shariah are applicable to all alike, we will dwell at length on the question of the accountability of the rulers. Here it has been simply touched upon to explain the distinguishing characteristics of the Islamic Law and to show that the principles of Shariah are superior to those of modern law.

Principle No.3: The People's Right to remove the ruler.

As has already been stated, the office of the Imam rests on a contract under which the masses choose their leader. The ruler on his part, keeps an eye on their affairs and problems and leads them in a manner determined by the Shariah. The conclusion of this logic that ruler who performs his functions within the limits laid down for him is to be obeyed and one who does not discharge his responsibilities or respect the said limits, the masses are not bound to follow and obey him; such a ruler is advised to quit his office at once and make room for one ho is fully capable of enforcing the divine laws. If he does not quit of his own accord, the nation should overthrow him and choose some suitable person in his place. The same logical conclusion also constitutes a Quranic injunction which the Holy Prophet (S.A.W.) acted upon, and his caliphs followed suit subsequently. Allah enjoins upon the Muslims to obey the people in authority within the limits prescribed by the Holy Prophet (S.A.W)

> "O ye who believe! Obey Allah and obey the Messenger and those of you who are in authority; and if you have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end." (4:59)

The Holy Prophet, however, says:-

> "If any act is tantamount to the defiance of Allah's command, no created being can be obeyed in doing it."

According to another tradition the Prophet said:-

> "Obedience is enjoined only in what is good."

Another saying of the Prophet regarding obedience to people in authority is as follows:-

> "Whoever amongst them commands to do something sinful, his mandate is not binding."

After the demise of the Prophet, Hazrat Abu Bakr was appointed the caliph by the Muslims. In the very first speech the delivered in this capacity, he elucidated the above injunctions in a subtle manner. He declared:

> "O people! I have been appointed you governor, but I am no better than you. I do aught good, help me, and if I go wrong, set me right.
>
> As long as I obey Allah and His Apostle, obey, me, but when I defy their injunctions, my command will no be binding on you."

When Hazrat Umar succeeded Hazrat Abu Baker, he wanted to impress the above injunctions upon the minds of the peoples.

So he said;-

> "I wand that the people should choose a chief even if you and I are committed to the stormy waves of the ocean in a boat and the boat is being tossed by the waves hither and thither. If the chief chosen by you treads on the right path, follow him; but if he goes astray, they should execute him." Hazrat Talha (who was present) objected. "Why not say that if he takes the wrong path, the people should remove him." "No", retorted Hazrat Umar, "execution will serve as a better example for his successors."

This doctrine of the limitation of authority was presented by the Shariah at a time when powers of the ruler knew no bounds. Evidently this concept did not emerge simply because it was suited to the needs of the time and the prevailing conditions. It was rather necessitated by the need to make the Shariah perfect and perpetually applicable, to raise the standard of the society, and set it on the path of progress.

The injunctions pertaining to the above doctrine ar comprehensive and flexible enough to be applied at all times and at all places and will never be inapplicable to any new situation.

The Shariah has been far ahead of all the modern laws in imposing limitation on authority. It was the first to provide this basis of a relationship between the ruler and the ruled and to expound the principle of the community's supremacy to the people in authority. The first modern law which acknowledged the paramount of the people over the ruling class is the law of England which absorbed it in the seventeenth century, i.e., eleven centuries after the advent of the Islamic Shariah. It was later incorporated in other laws in the wake of the French Revolution. The modern law has followed also the application of the above doctrine, declaring constitution as the line of demarcation between the rulers and the ruled, in which the rights of the community and the rulers and the latter's jurisdiction are laid down just as the injunctions of the Quran and Sunnah which virtually comprises Islamic constitution, marks off the rulers and the ruled from each other.

The Conception of Divorce

The Shariah permits man to divorce his wife, whether his marriage with her has been consummated or not and even if there is nothing to show that any harm has been done to wedlock. The husband has the right to divorce her at all events.

However, the Shariah allows woman to have recourse to a court of law to seek divorce provided that her husband is the cause of her moral deterioration and material loss or fails to fulfill his obligations towards her as provided for in the Shariah.

Man occupies a position superior to that of woman and plays a leading role in conjugal affairs. That makes all the difference between the rights of man and woman to divorce. It is man indeed, who has. To shoulder all the responsibilities in relation to those affairs. It is he who has to pay to woman the dowry agreed upon, to bear the charges of marriage and meet the expenses of woman from the first day of wedding, whether or not she has moved to his house. He has to bear responsibilities with regard to children. In view of all these great responsibilities man must have unconditional right to divorce. This is in the interest of woman as well; for if man is called upon to explain the causes of divorce, it may jeopardize the reputation of woman. In that case he may face difficulty in marrying again. The woman has been given the right to seek divorce in the event of any material or moral harm done to her by her husband. This conditional right of woman is not only in accord with the principle of man's superiority but also constitutes a safeguard against any possible transgression on his part. It also guarantees protection to man against any undue demand of woman seeking divorce.

In short, the Shariah acknowledges, on the one hand, man's unconditional right to divorce, while providing for his obligations in respect of the woman and her interests on the other. Divorce may take place either before the consummation of marriage and determination of dowry or after the completion of these formalities. In either case their are certain specific legal obligations for man to fulfill. These obligations are not only a sort of compensation for woman but also serve as a curb on man, making him think a hundred times before deciding to divorce.

Divorce Prior to Consummation and Determination of Dowry

If man divorces his wife before consummation of marriage and termination of of dowry, he shall give her something by way of compensation according to the prevailing custom. By custom it is meant the practice prevailing among the people of husband's rank and class at a certain place. Persons of similar and equal men would serve as an example in this case. The relevant verse of the Holy Quran is as follows:-

> "It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed unto them a portion provided for them, the rich according to his means and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do well." (2:236)

Divorce Before Consummation and after the Determination of Dowry

If a man divorces his wife before the consummation of marriage and after dowry is agreed upon he shall pay half the amount of dowry thus determined so that the woman might be compensated for the divorce in accordance with the Quranic injunction:-

> "If a man divorces them before ye have touched them and ye have appointed unto them a portion, then (pay them) half that while ye appointed unless they (the women) agree to forego it or he agrees to forgo it, in whose hand is the marriage tie" (i.e. bridegroom)
>
> (2:137)

Divorce after Consummation

If a man divorces his wife after consummation, he shall pay to her the amount of dowry agreed upon in full, although he may not be having the major portion of the amount at the moment. Besides, whatever the man may have given to her at the time of marriage as well as that which he may have given to her under legal obligation or at pleasure during the wedlock exclusively belongs to her and he shall not be entitled to claim it back. The Quranic verse to his effect is as follows:-

> "And if you wish to change one wife for another and ye have given unto one of them a sum of money (however great) take nothing from if. Would ye take it by the way of calumny and open wrong?"

On divorcing a woman a husband is under the obligation to bear her expenses till 'iddat' or waiting period of iddat' varies according to as she is pregnant or not is case she is pregnant the Quran fizes the waiting period as follows

> "And for those with child, Their period shall be till they bring forth their burden".

> If she is not pregnant, her waiting period shall be till they bring forth their burden".

> "Women who are divorced shall wait, keeping themselves apart, three (monthly) courses."

The term occurring in this verse has been interpreted differently by different scholars. According to one view it is synonymous with menstrual period, while according to another it extends to the time of her purification from menstruation.

It is quite clear from the above verses, the Quranic injunctions pertaining to divorce are comprehensive and flexible to the highest degree and are, therefore, suited to all places and all times. They are invariable and admit of no modifications. Time has proved it beyond doubt that despite the lapse of over thirteen hundred years these injunctions are as frees, sublime, and potential as they were at the time of revelation. The Islamic Shariah allowed the right of divorce to both husband and wife thirteen centuries ago, qualifying it, however, with firm, fair and equal guarantees to both the parties; whereas in the modern world it was introduced and acknowledged as late as the twentieth century. Before that the people of the West criticized the Islamic Shariah for its provision for the right to divorce. But in course of time, as the era f learning ad advancement dawned and the Western nations were set on the path of progress, the rust blighting their intellect was removed and their scholars and thinkers came to realize that the right to divorce was actually a blessing to both husband and wife and the only way out of the predicament resulting from unsuccessful conjugal union, miserable social life and psychological torment. It was now comprehensible to them that the life of both man and wife could be ameliorated and both of them could be delivered from devilish apprehensions through divorce alone.

There is no advanced nation in the present day word that does not have a law of divorce. However, modern laws of divorce vary from nation to nation. Some of them have a wider scope of application while other have only a limited scope. According to the Russian law, for instance, both man and woman enjoy the right to divorce. Thus the Soviet Union, keeping in view man's right to divorce, as provided for in the Islamic Shariah, has acknowledge it as true of both man and woman. In some of the States in USA, on the other hand, man woman both have been allowed the right to seek divorce provide that the person seeking it proves that the other party is cause of material loss or spiritual and moral harm to him or her as the case may be. In other words, these laws apply the Islamic right of woman to seek divorce to both man and woman under special circumstances and within a limited range.

To sum up, the world has accepted the Islamic concept of divorce after the lapse of thirteen hundred years. It is quite possible that before the end of the twentieth century the modern laws may be amended to provide for a wider range of application and thus absorb the Islamic concept in its entirety.

In view of what has been said above we are in a position to maintain that when the Shariah was revealed, the world was not prepared to accept its concept of divorce. The object of this provision was to make the Shariah comprehensive and inclusive of all the concepts essential for a perfect and everlasting law and thereby raise the standard of human society and set it on the path of progress and perfection.

The Concept of Prohibition

The Islamic Shariah declares the use of liquor unlawful absolutely and unconditionally and includes the punishment of its use among those *hudoods* or punitive measures form which no person or authority is empowered to exempt the offender, just as he is not competent to pardon any of those crimes for which such hoods or punitive measures have been prescribed. The Qazi or the judge is, therefore, not authorized to reduce the above *hudoods* oor commute them into other punishments or suspend their execution. However, Islam did not declare the use of liquor unlawful at once, but did it gradually; for drinking was common among the Arabs and was the only means of revelry. Hence wisdom demanded that the punishment for it should be encored gradually. Thus the following verse of the Holy Quran was the first to be revealed to forbid liquor.

> "O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter."
>
> (4:43)

In this verse Allah forbids prayer when one is intoxicated. Since prayer has been made obligatory from 'fajr', (Prayer offered before daybreak) to Isha (night prayer) five times a day the logical result of this injunction would be to drink liquor only in such quantities as do not intoxicate the mind and one is able to offer one's prayer in a state of sobriety. That was probably the reason that the companions of the holy Prophet were constrained to enquire about the real injunction as to liquor and it was in response to their enquiry and in order to explain the cause of prohibition that the following verse was revealed.

> "They question thee about strong drink and games of change. Say in both is great sin and (some) utility for men' but sin for them is greater than their use fullness." (2:219)

When the people were mentally prepared to give up drinking by the gradual revelation of verse pertaining to prohibition, the final and unequivocal injunction was revealed:-

> "O ye who believe! Strong drink and games of change and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside that ye may succeed. Satan sleeked only to cast among you enmity and hatred by means of strong drink and games change and turn you from remembrance of Allah and from his worship. Will you then have done?"
>
> (5:90-91)

Evidently, the above injunctions of Shariah are all embracive and flexible to the highest degree. By virtue of these characteristics they remain applicable after the ages to come, just as they had been at the time of their revelation. Hence when we say that the Shariah is immutable, we mean that its framework is perfect and admits of modification.

Prohibition was not enjoined by the Shariah to suit conditions obtaining in ancient society; nor was it imposed in response to social needs. In fact, the idea of prohibition was absolutely alien to the people in that day, who were far from being prepared to accept it. The object of providing for prohibition was to make the Shaiah inclusive inclusive of all that is essential for a standard of human society to the highest degree of consummation and sublimity. The non-Muslim world of today is anxious to impose prohibition and the people are mentally prepared for it. Obviously, the Islamic Shariah by its injunction forbidding the use of liquor, gave the clarion call to the Muslims to move thirteen centuries ahead on the path of progress.

Islam called upon the people to abstain from liquor as long back as the seventh century after the death of Christ. Only the Islamic countries responded to its call, while liquor continued to be in common use in the non-Islamic world. With the development of science however, it was proved at last that liquor is full of dangerous potentialities resources; it weakens man's reason and enervates his progeny. The hereditary effects of excessive drinking on posterity are ruinous. Owing to this discovery of science, the movement for prohibition has gathered momentum. Consequently, organizations have been set up and funds collected to dissuade the people in various countries from the use of liquor. Moreover, special issues of newspapers and magazines have been published to project the harm done by addiction to the intoxicants. The movement has really been a considerable success. From the widespread support of the social reformers and thinkers it may safely be inferred that the movement has now become universal.

The impact of this movement is manifest in the laws enacted and promulgated during the twentieth century. Only a few years ago a law to impose total prohibition was passed in USA. In India similar act was passed a couple of year's beck. Governments of both the countries have declared the use of liquor absolutely unlawful. In most of the other countries partial prohibition has been imposed, banning the sale and purchase of liquor at public places during fixed hours of the day, and totally forbidding the offer or sale of liquor to persons under certain age limits.

In short, as it has been scientifically proved that liquor is extremely harmful to human being and the world is mentally prepared for a ban on its use, the campaign for prohibition is gaining momentum and the scholars and reformers are lending it every possible support. The day is not far off when all the nations of the world will enforce prohibition. In other words mankind which for thirteen hundred years has paid no heed to the Islamic Injunction of prohibition, is now responding to it.

The concept of Polygamy

Islam has allowed polygamy right the very beginning but under the condition that the husband can do justice to his wives. But if the thinks that he will no be able to do justice to them he is allowed to take one wife only. However, if he is sure that he an fairly treat all his wives, he is permitted to marry a maximum number of four women. The Quranic injection to this effect is as under:-

> "Marry of the women who seem good to you, two or three or four;
> and if ye fear that ye cannot do justice (to so many) then one (only).
> (4:3)

The Shariah's concept of Polygamy has a philosophy of its own and it is in harmony with human nature as well as with the objectives which the Shariah lays down for polygamy.

The idea underlying the provision for polygamy is interrelated with adultery which the Shariah declares totally unlawful and for which it prescribes the severest punishment so much so that adultery committed by a married person is punishable by stoning the offender to death. Obviously, the Shariah could not have kept the door open for adultery, while declaring it a heinous crime. Ban on polygamy Undoubteldy leads to adultery; for males are being out-numbered by females in the world. Each war results in an increase in the rate of female population. Prohibition of polygamy in such a situation would mean that a large number of women would be deprived of matrimony with the result that they would have to resist the demand of nature. As she will, of necessity, succumb to the increasing pressure of those demands, she will not be able to preserve her chastity and will ultimately fall into the abyss of sinful life.

Another thing to be taken into consideration here is that sexual capacities of man woman are not equal. The woman is not always capable of gratifying man's sexual desire because the period of her monthly course normally spreads over a week and sometimes over of her monthly course normally spreads over a week and sometimes over a fortnight. Intercourse during these days is unlawful. Again during her puerperal period of forty days after childbirth, sexual intercourse is forbidden. Besides, the women sexual drive is at a low ebb during pregnancy and she is almost sexually benumbed during at least one third of her period of pregnancy. But man's capacity is always the same. Now, if he is forbidden to have more than one wife, he will feel naturally inclined to commit adultery as most men are incapable of curbing their sexual desire during their wives periods of menstruation, maternity and pregnancy.

By allowing polygamy, the Shariah has harmonized itself with human nature and assessed the relative libidinal capacities and impulses of the sexex with accuracy. Thus it does not subject man and woman to a test in which the chances of success are hardly ten percent; nor does it, by restricting man to a single wife, suffer some woman to remain unmarried all their life to yearn for husbands without ever having them, to dream the dreams of children and happy home never to be fulfilled, and to struggle against their sexual urge and in the process grow mentally and physically sick and lose their honour and chastity by seeking to gratify it unlawfully.

As males are often swayed by passion the Shariah does not impose monogamy on man and thus have him at mercy of his libido. Although the same is true of females, yet they have greater capacity to restrain their sexual urge than the males.

Polygamy is also in harmony with the object talent in sexual relations, that is survival of the species. Marriage has been made obligatory for reproduction and giving rise to the family. Now, if the woman, a man marries, turns out to be barren while polygamy is disallowed, he will not be able to fulfill the aim of sexual function and the very purpose of marriage is also defeated. Man's fecundity is infinite, while the fertility of woman is limited. Man is capable of procreation at the age of sixty or even seventy which is also his maximum span of life. Woman, on the other hand, is capable of conception till the age of forty or at the most fifty. If monogamy is thrust upon him for half the period during which he has the potency of perform this natural functions.

The Islamic concept of polygamy puts an end to the harm and evil resulting from monogamy, ensures justice between women and elevates the moral standard of the society. The Islamic concept of polygamy is comprehensive and flexible to the highest degree and that is the reason why it remains applicable to this day and will continue to be so in future.

This injunction of Shariah was not intended for making adjustments with the prevailing social conditions. Since the Arabs of yore used to have unlimited number of wives, imposition of a ceiling on them was not palatable to those people. They had to divorce numerous wives in pursuance of the Quranic injunction retaining only four. However, provision for polygamy in Shariah limiting the number of wives was necessitated by the need to raise the social standard.

The Islamic doctrine of polygamy is one of those concepts which the modern law has not recognized as ye. On the contrary the westerners have in the past. Regarded it with amazement or rather abhorrence. They have subjected Islam to criticism on account of polygamy. How ever, the merit of this doctrine is now coming to be recognized by scholars and reformers in the west. It is also a subject of comments in the western newspapers and magazines. May be that the modern law accepts this Islamic concepts as well at some stage. After the two world wars, the western mind is coming closer to it. This is because innumerable men perished and equal number of women or women were widowed during those wars. Thus the women have far out-numbered men.

But the horrors of war have not been the only factor setting the westerns to ponder over the legitimacy of polygamy. There are other factors, to that have co-mingled to give rise to this trend. Some of them are enumerated here.

First, friendship between sexes has increased to such a proportion that one man has many lady friends to share his manliness, favours an income with his wife. In some cases the lady friends benefit much more from the man than his real wife does.

Second, adultery in the western world knows no bounds. It has produced serious effects. One of them is illegitimate children. The unmarried mothers either leave them stealthily on roadside in order to avoid scandal or do away with them by having abortion.

Third, the surplus number of women naturally desires to have husbands and children.

Fourth, the rate of reproduction has dimished in the west a considerable extent.

In view of all these factors, the westerners are obliged to ponder over the merits of polygamy, which alone is the natural remedy for the evils that pose a serious threat to the western society.

Evidence and Contract

The concepts of evidence and contract as presented by the Islamic Shariah are being dealt with here under the same title, the reason being that all the ideas pertaining to the subject have been expounded in the Holy Quran in a single verse about contracting a debt and that they are al interrelated. We will examine them with a view to bringing out the characteristics of the Islamic Shariah. The above verse is as under:-

> "O ye who believe! When ye contract a debt for a fixed term, record it in writing. Let a scribe recorded it in writing between you in (terms of) equity. No scribe should refuse to write as Allah has taught him, so let him write, and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof. But if he who oweth the debt is of low understanding or weak or unable himself to dictate, let the guardian of his interests dictate in (term of) equity. And call to witness from among your men to witness. An if two men be not (at hand), then a man and two women of such as ye approve as witnesses so that if one errata (through forgetfulness) the other will remember. And the witnesses will not refuse when they are summoned. Be not averse to writing down (the contract) whether it be small or great with (record of) the term thereof. That is more equitable in the Sight of Allah and more sure for testimony, and the best way of avoiding doubt between you; save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it is no sin for you if ye write it not. And have witnesses when ye sell one to another, and let no harm be done to scribe or witness. If ye do (harm to them) lo, it is a sin in you. Observe your duty to Allah. Allah is teaching you. And Allah is knower of all things".

The text of the above verse comprises certain principles of law and jurisprudence. Some of them to be discussed by us are as follows

The concept of written evidence

The Shariah makes it obligatory to recorded in writing a debt whether it is extended for a long period or a short one. This is clear from the following words of the Quranic verse quoted above:-

> "O ye who believe! When you contract a debt for a fixed term, record it in writing." (2:282)
>
> "Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof."
> (2:282)

The original Arabic word '*Dain*' covers every obligation, for each obligation accepted by one party towards the others is in the name f debt the oblige to the obligor. Hence the contract of debt implies all specifies transitions including mortgage, purchase of things on credit and the agreement of work.

But in case of hand to hand dealing, with both parties fulfilling their obligations there and then, such transactions need not be written down. For instance, purchase of a things by a person in such a way as he obtains it from the seller by paying transition which can be carried on without being recorded in black and white, whatever may be the price of the things so exchanged. Such dealings are actually in the nature of any event and no tan undertaking. And physical events may be proved buy any method of rectification. The injunction pertaining to writing in most comprehensive and flexible. It is applicable to be applicable in future in quite the same way. It is because of such all embracive and flexible provision, it is not *amen-able* to any modification and change.

When the above verse was revealed, the Arabs were illiterate people who lived a very tough life in the immensity of inhospitable desert. They seldom entered into such transactions as required writing. Had the genius of the Shariah been the same as that of the man-made law, it would have contained provisions that suited the needs of the people, or for that matter, it would have been in keeping with illiteracy and ignorance of the Arabs. But the Shariah made it compulsory even for those illiterate people to record in writing their transactions whether big or small. This sublimity is the distinguishing mark of Islamic law.

The purpose of making writing compulsory was to persuade the Arabs to receive education so that their mental horizons might be widened, their minds cultivated, they might be able to understand the world better and come to grips with the other nations of the world better and finally subjugate them. Apart from these purely political and social aspects of the injunction in regard to writing, there are. Legal benefits of it as well, which include protection of rights, production of evidence and removal of doubt and misunderstanding.

By declaring writing as compulsory, the Shariah has expounded a great multidimensional doctrine. It was revealed to the Holy Prophet (S.A.W.) by Allah through the Holy Book in 7th Century, but is one of the most modern laws and theories of social life. Many countries made universal education compulsory in the nineteenth and the beginning of the twentieth century. This, in effect, is the application of Islamic doctrine in the political and social fields. The French made writing obligatory in any transaction that exceeded a fixed amount and all the laws of the western countries subsequently took the idea from the French. However, the legal experts are of the opinion that written evidence word not be complete and effective unless every dealing regardless of its magnitude as required by the law, is put down in black and white. They went on advocating this view until some of the European countries incorporated the doctrine in their laws. Similar attempts are being made in other countries. They are also expected to provide for it. In other words, the most modern doctrine of evidence in the present age is the one which the Islamic Shariah has presented and which now forms a part of the modern law. Legal experts in other countries, are stressing the need to adopt it in their laws as well.

Evidence of Commercial Transactions

As has already been explained, writing has been enjoined for the proof of lending and borrowing. But commercial dealings have been exempted from this general rule.

If need be, a transaction of lending has, likewise, been exempted from this rule. The following verse of the Holy Quran comprises the injunction to this effect:-

۞ وَإِن كُنتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا۟ كَاتِبًا فَرِهَـٰنٌ مَّقْبُوضَةٌ ۖ فَإِنْ أَمِنَ
بَعْضُكُم بَعْضًا فَلْيُؤَدِّ ٱلَّذِى ٱؤْتُمِنَ أَمَـٰنَتَهُۥ وَلْيَتَّقِ ٱللَّهَ رَبَّهُۥ ۗ وَلَا
تَكْتُمُوا۟ ٱلشَّهَـٰدَةَ ۚ وَمَن يَكْتُمْهَا فَإِنَّهُۥٓ ءَاثِمٌ قَلْبُهُۥ ۗ وَٱللَّهُ بِمَا
تَعْمَلُونَ عَلِيمٌ ﴿٢٨٣﴾

> "If ye be on journey and cannot find a scribe, then a pledge in hand (shall suffice). If one of you entrusted to another, let him who is trusted, deliver up that which is entrusted to him (according to the fact between them) and let him observe his duty to Allah. Hide not testimony. He who hideth it, verily his heart is sinful. Allah is aware of what you do. (2:283)

The Shariah allows to adopt other methods of rectification to prove a commercial transaction:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا تَدَايَنتُم بِدَيۡنٍ إِلَىٰٓ أَجَلٖ مُّسَمّٗى
فَٱكۡتُبُوهُۚ وَلۡيَكۡتُب بَّيۡنَكُمۡ كَاتِبُۢ بِٱلۡعَدۡلِۚ وَلَا يَأۡبَ كَاتِبٌ أَن
يَكۡتُبَ كَمَا عَلَّمَهُ ٱللَّهُۚ فَلۡيَكۡتُبۡ وَلۡيُمۡلِلِ ٱلَّذِي عَلَيۡهِ ٱلۡحَقُّ
وَلۡيَتَّقِ ٱللَّهَ رَبَّهُۥ وَلَا يَبۡخَسۡ مِنۡهُ شَيۡـٔٗاۚ فَإِن كَانَ ٱلَّذِي عَلَيۡهِ ٱلۡحَقُّ
سَفِيهًا أَوۡ ضَعِيفًا أَوۡ لَا يَسۡتَطِيعُ أَن يُمِلَّ هُوَ فَلۡيُمۡلِلۡ وَلِيُّهُۥ بِٱلۡعَدۡلِۚ
وَٱسۡتَشۡهِدُواْ شَهِيدَيۡنِ مِن رِّجَالِكُمۡۖ فَإِن لَّمۡ يَكُونَا رَجُلَيۡنِ
فَرَجُلٞ وَٱمۡرَأَتَانِ مِمَّن تَرۡضَوۡنَ مِنَ ٱلشُّهَدَآءِ أَن تَضِلَّ إِحۡدَىٰهُمَا
فَتُذَكِّرَ إِحۡدَىٰهُمَا ٱلۡأُخۡرَىٰۚ وَلَا يَأۡبَ ٱلشُّهَدَآءُ إِذَا مَا دُعُواْۚ وَلَا
تَسۡـَٔمُوٓاْ أَن تَكۡتُبُوهُ صَغِيرًا أَوۡ كَبِيرًا إِلَىٰٓ أَجَلِهِۦۚ ذَٰلِكُمۡ أَقۡسَطُ
عِندَ ٱللَّهِ وَأَقۡوَمُ لِلشَّهَٰدَةِ وَأَدۡنَىٰٓ أَلَّا تَرۡتَابُوٓاْۖ إِلَّآ أَن تَكُونَ تِجَٰرَةً
حَاضِرَةٗ تُدِيرُونَهَا بَيۡنَكُمۡ فَلَيۡسَ عَلَيۡكُمۡ جُنَاحٌ أَلَّا تَكۡتُبُوهَاۗ
وَأَشۡهِدُوٓاْ إِذَا تَبَايَعۡتُمۡۚ وَلَا يُضَآرَّ كَاتِبٞ وَلَا شَهِيدٞۚ وَإِن
تَفۡعَلُواْ فَإِنَّهُۥ فُسُوقُۢ بِكُمۡۗ وَٱتَّقُواْ ٱللَّهَۖ وَيُعَلِّمُكُمُ ٱللَّهُۗ
وَٱللَّهُ بِكُلِّ شَيۡءٍ عَلِيمٞ ٢٨٢

> "Save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it so sin for you if ye write it not."(2:282)

The basic cause of exempting commercial dealings from the provision relating to writing is that such transactions are carried on speedily and there is hardly any time for recording them. Moreover, they are multifarious and innumerable, taking place ceaselessly. Hence if the condition of putting them down in black and white is imposed upon them as has been in the case of lending and borrowing, the buyer may run the risk of buying and the seller may suffer a loss on account of it. That is why the above condition has not been laid down for commercial dealings. The provision of Shariah to this effect, like all other provisions, is comprehensive and flexible to the highest degree. This is the reason why it admits of no amendment and is fully applicable today after the lapse of thirteen centuries.

A man acquainted with the history of the Arabs, particularly with the conditions obtaining at the dawn of the Islamic era, know it fully well that the Quranic verse containing prevailing at that stage of the social development of the Arabs. It was indubitably much higher that the standard of their social life. The injunction was revealed by Allah in order that an everlasting law might be complete in all respects and the social standard and the social standard may be raised to divert the course of their development in the right direction.

There can be no better proof for the perfection and sublimity of the Shariah that the fact that its provision in respect of the conduct of commercial transactions is to be found in the most modern laws of the world and thus it may be regarded as the latest discovery in the field of law.

Text of contract shall be dictated by the obligor

A general principle laid down by the Shariah is that the terms of the contract are to be dictated by the person incurring a debt or accepting an obligation. In other word this is to be done by the weaker party. The purpose of this provision is to give protection to the weak party *vis-a-vis* the strong one, since the latter is likely to take advantage of his strong position and and the weaker party by stringent conditions. If the strong party is a creditor, he will lay down hard conditions for the debtor and if he is an employer, hiring labor on fixed wages, he will try to usurp the rights of the workers by safeguarding his own rights. The workers or the debtors will not be in a position to lay down conditions in their interest or safeguard his rights. That is why the 'Shariah gives the right to dictate the contract to the weaker party enabling to safeguard his own interest, avoid confusion, be well conversant with the terns of the contract and be aware of his liability.

The problem to which the shariah offers solution is the most important problem of modern age. It owes its origin to the industrial revolution of Europe in nineteenth century which brought forth in its wake innumerable factories and countless number of workers and employers. The most striking aspect of the issue is that the employers exploit the workers and the consumers by dictating stringent conditions that the printed on a prescribed form to which the man anxious to secure a job or consumer goods is obliged to affix his signature. the terms of the agreement are determined so as to benefit the employer or the manufacturer at the expense of the worker and the consumer.

This kind of transaction is is legally termed as 'arbitrary contract'.

Many attempts have been made in the modern law to tackle this problem. For instance the manufacturer is bound by such conditions as may safeguard the interests of the consumer. Similarly, prices of commodities have been fixed. But so far as the problems between the employer and the workers are concerned, the modern law has been able to solve only some of them. The workers now get compensation in case of accident or dismissal. But total intervention in the affairs of the employers and the management is likely to affect product. Therefore, law cannot be brought to bar on all the terms of employment with the result that the most important aspects of the problem remain unsolved which include wages, working hours, leave etc. The workers now try to get these issues resolved themselves by setting up their organizations, forming trade unions and resorting to strikes. They think that the problem cannot be solved unless they are allowed to dictate the terms. Some thinkers and writers fully subscribe to their rights, suspend work and writers fully subscribe to their view. In short workers in every part of the world clamor for their rights suspend work and create law an order situation in order to achieve their ends. Their right has been partly recognized by the modern law. They are sanguine about getting it fully accepted sooner or later. The Islamic Shariah has recognized this right in its entirety by providing for the right of obligor or the weak part to dictate the terms of agreement. The Quranic verse relating to contracting a debt enjoins it as follows:-

> "and let him who incurreth the debt dictate and flexibility of the injunction contained in the above verse. This is the very characteristic of Shariah by virtue of which it admits of no change or amendment. It is a provision which bears clear testimony to the sublimity perfection and justness of the Shariah. This golden principle was laid down by the Islamic law thirteen hundred years ago. The modern law has yet to provide for such principles in spite of all its advancement."

Refusal to bear witness improper

According to the Islamic law it is wrong on the part of a man to decline to be a witness, when summoned to do so. It is also wrong to suppress or conceal anything to which one has been an eyewitness.

> "And witnesses must no refuse when they are summoned".
> (2:282)

'Refusal' here implies refusal to be a witness to a particular incident or transaction, when called to; for the verse relates specifically t bearing witness to the exclusion of giving evidence.

Divine injunctions as to suppression or misrepresentation of facts are as follows:-

> "Hide not testimony. He ye staunch in justice, verily his heart is sinful" (2:283)
>
> "O ye, who believe, Be ye staunch in justice, witnesses for Allah, even though it be against yourselves, or (your) parent or (your) kindred, whether (the case he or) of a rich man or a poor man for Allah is near unto both (than' ye are). So follow not passion lest ye lapse (form truth) and if ye lapse or fall away, then lo! Allah is ever informed of what you do. (4:135)

As has already been mentioned those two provisions relate to hiding and giving evidence and declare false evidence unlawful.

It is the Islamic Shariah which the modern laws follow in prohibiting giving false evidence or suppressing facts. But these laws have not yet reached the stage where refusal to hear witness constitutes violation of laws in this respect also, much as the public interest demands that rights of citizens should be protected, transactions among them facilitated, and nobody should be allowed to decline in bearing witness in matters wherein the people are likely to be deprived of their rights and their transaction complicated and delayed. Again, there are certain matters in which the presence of witnesses is absolutely essential; for instance, in the case of a contract of marriage, if refusal to bear witness is allowed, matters such as these will come to a standstill.

Moreover, provisions of the Islmaic law for-biding refusal to bear witness and suppression of evidence or giving false evidence are characterized b generality and flexibility of the highest degree and bear testimony to the fact that the Shariah is not open to modification or amendment.

If you compare the Shariah to the modern law, you will find how sublime and comprehensive it is and that its provisions were not intended for keeping abreast of the development of the contemporary Arab society. They were rather needed for a universal, everlasting and perfect law and for elevating mankind to a social plane on which its collective standard might approximate to the standard of the ideal Shairah.

Other Injunctions contained in the verse relating to a contract of debt

In the Quranic verse under consideration four different doctrines have been expounded. Of these, two have been incorporated in the modern law, while the third is now being adopted. But the fourth doctrine is still out of the reach of modern law. However, the verse is not confined to only the four injunctions. There are other principles contained in it too, which include the provisions that the scribe, writing the contract, should he impartial, just and well conversant with injunctions of Shariah; that two men or one man and two women are required to be witnesses of the document and that the scribe and the witnesses shall come to no harm on account of the transaction between the obligor and the oblige.

These are the general principles and it will be out of place to dwell at length on them in this volume since it principles in order to bring home to our readers the sublimity, perfection and perpetual validity of the Islamic Shariah so that one may not be led to think that these virtues are to be found in some of the provisions of the Shariah, while others are devoid of them.

A word of Advice

Before coming to the main subject, I have a couple of words to say to those Muslims who labor under the misapprehension that the Islamic Shariah is incapable of fulfilling the needs of the present age. This notion contradicts the very belief to which they claim to hold fast and want to act upon, Allah says in the holy Quran:-

> Believe ye in part of the scripture and disbelieve in part thereof? And what is the reward of those who do so save ignominy in the life of the world and on the Day of Resurrection they will be consigned to the most grievous doom. For Allah is not unaware of what you do." (2:85)

My brothers in faith should bear it in mind that the real cause of our degradation and decline is that we have long ceased to live up to Islam in its entirety. The Turk and the Mamluk are rules in our history, decade matters as they pleased to serve their own ends. They cared to apply the provisions of the Shariah only in those spheres where in they did not go against their wishes Since the springs of our backwardness lie in deviation from Islamic principles and ceasing to translate then into practice, it will be futile to adopt modern laws. On the contrary following the western countries blindfold would quicken the tempo of our decline. The only remedy for the downfall of the Muslims is to remove the basic cause thereof and to enforce Islam is their practical life.

We have long been following the course of acting on some of the injunctions of the Quran, while abandoning others. We believe in part of the scripture and disbelieve in part thereof. Consequently Allah debased and disgraced us the past as we are degraded and infamous today. Our infamy and ignominy serve as an example to the nations of the world. There is no way out of this predicament unless we are determined to rebuild our character and resuscitate our Soul, believe in the Quran and Sunnah in all sincerity and firmly and enforce Islam in its entirety. Allah, Whose word alone is true, tells us:-

لَهُۥ مُعَقِّبَٰتٌ مِّنۢ بَيۡنِ يَدَيۡهِ وَمِنۡ خَلۡفِهِۦ يَحۡفَظُونَهُۥ مِنۡ أَمۡرِ ٱللَّهِۗ إِنَّ ٱللَّهَ
لَا يُغَيِّرُ مَا بِقَوۡمٍ حَتَّىٰ يُغَيِّرُواْ مَا بِأَنفُسِهِمۡۗ وَإِذَآ أَرَادَ ٱللَّهُ بِقَوۡمٖ سُوٓءٗا فَلَا
مَرَدَّ لَهُۥۚ وَمَا لَهُم مِّن دُونِهِۦ مِن وَالٍ ﴿١١﴾

> "Lo Allah changed on the condition of a folk until they first change that which is in their hearts."
>
> (13:11)

Muslims of the earliest period believed fully and profoundly and theirs was the best faith, indeed, with the result that Allah made them rulers of the world. He bestowed upon them leadership of mankind notwithstanding their numerical insignificance and weakness. So also can Allah make us the masters of the earth provide that we have deep rooted and complete faith in Him and His Prophet. This is exactly the promise He holds out to those who unflinchingly believe in the scripture and translate Allah's Shariah into action as a whole.

> "Allah hath promised such of you as believe and do works that He will surely make them to succeed (the present rules) in the earth even as He caused those who were before them to succeed (others)."

(34:55)

"Now has come unto you light from Allah and a plain scripture, whereby Allah guided him who seecatch His good pleasure unto paths op peace. He brunet them out of darkness unto light by His decree, and guided them unto a straight path."

Mode of Discussion

The first part of this volme comprises a general discussion of criminal law. The subject requires to be treated under two heads:

(1) Crime and
(2) Punishment. Hence we have split it up into two separate parts.

A discussion of crime requires that it should first be treated off in general and those its fundamental elements should be dealt with. This necessitates the division of the first part into two portions; the one consisting of a general discussion of crime and the other of its fundamental elements. Each portion contains various chapters, sections and consideration of other necessary matters.

Discussion of punishment includes an exposition of the nature, principles, kinds and plurality of punishment and matters relating to enforcement and invalidation thereof.

CHAPTER 18

NATURE AND TEMPERAMENT OF THE ISLAMIC LAW

The Islamic shariah, or the Law of Islam, is cosmic and universal by nature. It is by virtue of that in its formulation due care has been paid to the natural inclinations and temperamental distinctions of all the people living in different parts of the globe. In other words, the commonly proper things have been taken into consideration while forming a natural law to govern the people, their natural differences notwithstanding. From among those primary things which are characteristics of the law of Islam and which shed light on the nature and spirit of it the following ones merit special mention in the present context:

- No such hard command has been prescribed as in unburnable and impracticable for the general people.
- Celebration of festives and the occasions of happiness is a natural wish which invariably exists in all the people and nations of the world. To give an outlet to this natural instinct two days have been prescribed to be celebrated yearly as the festive occasions and permission has been granted to adorn and give an inlet to one's passions and feelings within proper limits.
- In respect of the worships and the acts of devotion importance has been given to the natural inclination and personal interest holding permissible all such factors and motivations which might be helpful and supportive for the purpose as long as they are free from all such things which entail otherwise.
- The things abhorred by the people of sound nature have been declared forbidden.
- In order to provide an unfailing support to the process of casting the general human nature into Islamic temperamental mould the education, learning and teaching and *amr bil maruf and rahy anil munkar* have been made a permanent institution.
- In respect of obedience of some comparatively hard injunctions of the Shariah two grades of *azimat* (determination and firm resolve) and

rukhsat (permissibility, leisure) have been held, leaving it to the discretion of the human beings to choose either one according to one's capacity and capabilities.

- There are many injunctions of the shariah about which two different types of their execution have been reported, and in the changing set of circumstances they may be carried out differently.
- In some cases the punishment of committing evil deeds the doer's deprival of the resultant benefits has been held as its due punishment.
- Some important Divine injunctions and ordinances and, likewise, some grave important prohibitions have been introduced in a gradual and phased manner.
- In the constructive reform work due care has been paid to the flaws and perfection of the national character.
- Most acts of virtue have been mentioned and explained in detail. For had it been left to the discretion of the human reason, things would have been too difficult to solve.
- While in the execution of a number of the shariat injunctions consideration has been given to the expediencies and circumstances, in some others it is the persons and their temperaments which have been taken in consideration.

In the Holy Qur'an as well as in the Hadith there exists a number of clear expressions and indications which shed ample light on the principles set out above. To quote here a few of them:

مَثَلُ مَا يُنفِقُونَ فِي هَٰذِهِ ٱلۡحَيَوٰةِ ٱلدُّنۡيَا كَمَثَلِ رِيحٖ فِيهَا صِرٌّ
أَصَابَتۡ حَرۡثَ قَوۡمٖ ظَلَمُوٓاْ أَنفُسَهُمۡ فَأَهۡلَكَتۡهُۚ وَمَا ظَلَمَهُمُ ٱللَّهُ
وَلَٰكِنۡ أَنفُسَهُمۡ يَظۡلِمُونَ ١١٧

> The example of what they spend in this worldly life is like that of a wind containing frost which strikes the harvest of a people who

have wronged themselves and destroys it. And Allah has not wronged them, but they wrong themselves.[364]

شَهۡرُ رَمَضَانَ ٱلَّذِيٓ أُنزِلَ فِيهِ ٱلۡقُرۡءَانُ هُدٗى لِّلنَّاسِ
وَبَيِّنَٰتٖ مِّنَ ٱلۡهُدَىٰ وَٱلۡفُرۡقَانِۚ فَمَن شَهِدَ مِنكُمُ ٱلشَّهۡرَ
فَلۡيَصُمۡهُۖ وَمَن كَانَ مَرِيضًا أَوۡ عَلَىٰ سَفَرٖ فَعِدَّةٞ مِّنۡ أَيَّامٍ
أُخَرَۗ يُرِيدُ ٱللَّهُ بِكُمُ ٱلۡيُسۡرَ وَلَا يُرِيدُ بِكُمُ ٱلۡعُسۡرَ
وَلِتُكۡمِلُواْ ٱلۡعِدَّةَ وَلِتُكَبِّرُواْ ٱللَّهَ عَلَىٰ مَا هَدَىٰكُمۡ
وَلَعَلَّكُمۡ تَشۡكُرُونَ ١٨٥

The example of what they spend in this worldly life is like that of a wind containing frost which strikes the harvest of a people who have wronged themselves and destroys it. And Allah has not wronged them, but they wrong themselves.[365]

لَا يُكَلِّفُ ٱللَّهُ نَفۡسًا إِلَّا وُسۡعَهَاۚ لَهَا مَا كَسَبَتۡ وَعَلَيۡهَا مَا
ٱكۡتَسَبَتۡۗ رَبَّنَا لَا تُؤَاخِذۡنَآ إِن نَّسِينَآ أَوۡ أَخۡطَأۡنَاۚ رَبَّنَا وَلَا تَحۡمِلۡ
عَلَيۡنَآ إِصۡرٗا كَمَا حَمَلۡتَهُۥ عَلَى ٱلَّذِينَ مِن قَبۡلِنَاۚ رَبَّنَا وَلَا تُحَمِّلۡنَا
مَا لَا طَاقَةَ لَنَا بِهِۦۖ وَٱعۡفُ عَنَّا وَٱغۡفِرۡ لَنَا وَٱرۡحَمۡنَآۚ أَنتَ مَوۡلَىٰنَا
فَٱنصُرۡنَا عَلَى ٱلۡقَوۡمِ ٱلۡكَٰفِرِينَ ٢٨٦

Allah does not charge a soul except [with that within] its capacity. It will have [the consequence of] what [good] it has gained, and it will bear [the consequence of] what [evil] it has earned. "Our Lord, do not impose blame upon us if we have forgotten or erred. Our Lord, and lay not upon us a burden like that which You laid upon those before us. Our Lord, and burden us not with that which we have no ability to bear. And pardon us; and forgive us; and have mercy upon us. You are our protector, so give us victory over the disbelieving people."[366]

---

[364] Al-Qura'n 3: 117.

[365] Al-Qura'n 2: 185.

وَجَٰهِدُواْ فِي ٱللَّهِ حَقَّ جِهَادِهِۦۚ هُوَ ٱجۡتَبَىٰكُمۡ وَمَا جَعَلَ عَلَيۡكُمۡ
فِي ٱلدِّينِ مِنۡ حَرَجٖۚ مِّلَّةَ أَبِيكُمۡ إِبۡرَٰهِيمَۚ هُوَ سَمَّىٰكُمُ ٱلۡمُسۡلِمِينَ مِن
قَبۡلُ وَفِي هَٰذَا لِيَكُونَ ٱلرَّسُولُ شَهِيدًا عَلَيۡكُمۡ وَتَكُونُواْ شُهَدَآءَ عَلَى
ٱلنَّاسِۚ فَأَقِيمُواْ ٱلصَّلَوٰةَ وَءَاتُواْ ٱلزَّكَوٰةَ وَٱعۡتَصِمُواْ بِٱللَّهِ هُوَ مَوۡلَىٰكُمۡۖ
فَنِعۡمَ ٱلۡمَوۡلَىٰ وَنِعۡمَ ٱلنَّصِيرُ ٧٨

And strive for Allah with the striving due to Him. He has chosen you and has not placed upon you in the religion any difficulty. [It is] the religion of your father, Abraham. Allah named you "Muslims" before [in former scriptures] and in this [revelation] that the Messenger may be a witness over you and you may be witnesses over the people. So establish prayer and give zakah and hold fast to Allah . He is your protector; and excellent is the protector, and excellent is the helper.[367]

---

[366] Al-Qura'n 2:286.

[367] Al-Qura'n, Al-Haj 78.

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا قُمۡتُمۡ إِلَى ٱلصَّلَوٰةِ فَٱغۡسِلُواْ
وُجُوهَكُمۡ وَأَيۡدِيَكُمۡ إِلَى ٱلۡمَرَافِقِ وَٱمۡسَحُواْ بِرُءُوسِكُمۡ
وَأَرۡجُلَكُمۡ إِلَى ٱلۡكَعۡبَيۡنِۚ وَإِن كُنتُمۡ جُنُبٗا فَٱطَّهَّرُواْۚ وَإِن
كُنتُم مَّرۡضَىٰٓ أَوۡ عَلَىٰ سَفَرٍ أَوۡ جَآءَ أَحَدٞ مِّنكُم مِّنَ ٱلۡغَآئِطِ أَوۡ لَٰمَسۡتُمُ
ٱلنِّسَآءَ فَلَمۡ تَجِدُواْ مَآءٗ فَتَيَمَّمُواْ صَعِيدٗا طَيِّبٗا فَٱمۡسَحُواْ
بِوُجُوهِكُمۡ وَأَيۡدِيكُم مِّنۡهُۚ مَا يُرِيدُ ٱللَّهُ لِيَجۡعَلَ
عَلَيۡكُم مِّنۡ حَرَجٖ وَلَٰكِن يُرِيدُ لِيُطَهِّرَكُمۡ وَلِيُتِمَّ نِعۡمَتَهُۥ
عَلَيۡكُمۡ لَعَلَّكُمۡ تَشۡكُرُونَ ٦

> you who have believed, when you rise to [perform] prayer, wash your faces and your forearms to the elbows and wipe over your heads and wash your feet to the ankles. And if you are in a state of janabah, then purify yourselves. But if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women and do not find water, then seek clean earth and wipe over your faces and hands with it. Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful.[368]

While entrusting the responsibility of administering the religious affairs to Haz. Abu Musa Ash'ari and Haz. Mu’az bin Jabal, the Prophet (P.B.U.H.) commanded them:

> “Facilitate things for the people and do not render the things difficult for them; give the people good news and do not bring disaffection and repulsion. Obey and do not fall into discord.[369]

---

[368] Al-Qura'n, Al-Maida V.6

[369] Bukhari, Sahih, Maghazi, hadith 4342 and 4344, PP. 735, 736; Muslim, Sahih, al-Jihad wa al-Siyar’, hadith 1733, P. 689. To all the different versions of the hadith in question, the two men sent by the Prophet to Yaman were Ali bin Abu Talib and Abu Musa al-Ashari rather than Muadh bin Jabal.

The Holy Prophet (peace and blessings of Allah be upon him) has also said:

> “I have been sent with the lenient, tolerant, True Religion."[370]

> "In Islam there is no suffering a harm, or making others suffer a harm."[371]

About *miswak* (wooden tooth brush) the Holy Prophet (P.B.U.H.) is reported to have said:

> "Had I had not the fear that my *ummah* might fall in hardship, I would have commanded them to use *miswak* at every namaz."[372]

Explaining the reason why he did not annex the ‘Hatim’ to the structure of the Holy Ka’bah, the Holy Prophet (peace and blessings of Allah be upon him) said to Haz. Aisha Siddiqah.

> 'Had it not been the fact that your community is a new entrant into the fold of Islam, I would have demolished the present structure of the Kabah and then rebuilt it along the lines of the Ibrahimi structure, making two doors therein'.[373]

> In a tradition attributed to Ayisha, she is reported to have said: “Whenever the Prophet was given an option between two things, he always opted for the easier one of the two provided that it involved no sin.”, Then ‘sin’ (*ithm*) stands here for what the Shariah has declared prohibited.[374]

Once Haz. Abu Hurairah (may Allah be pleased with him) asked Abdullah bin Abbas (may Allah be pleased with them) “What does mean the, ‘No difficulty in the religion”, while all hedonistic acts, like adultery, theft and all other base desires have been declared forbidden”? The answer of Haz. Ibn Abbas was: ‘No difficulty in the religion means that this *ummah* has not been burdened with the hard type of commands as were burdened the Children of *Israil*.”[375]

---

[370] Ahmad ibn Hanbal, Musnad, Vol. 1, P 236 and Vol. 5, P 265, Bukhari, al-Adab al-Mufrad, hadith 287, P 109; Tarani, al-Mujam al-Kabir, hadith 7868, Vol.8, P. 216.

[371] Ibn Majah, 2340, 2341; Hakim, Mustadradik, Vol. 2, P, 57, 58

[372] Mishkat, 45, Chap. Sunan-al-Wudhu

[373] Musnad Ahmad P. 1896, Hadith No. 25952

[374] Bukhari, Sahih, ‘Hudud’, hadith 6786, P. 1170. The full and exact text of this hadith reads as follows: “Whenever the Holy Apostle of Allah was given an option between two things, he always selected the easier of the two as long as it involved no sin; otherwise he would keep himself away from it. By Allah, he never took revenge for himself concerning any matter that was presented to him; but when Allah’s ordained limits were transgressed, he would take revenge for Allah’s sake”.

The study of the verses the *ahadith* furnished above will help us understand the nature and temperament of the religion of Island am only its law. These items are only few out of the numerous normative principles of the Sharia't of Islam. In this mirror we can see how comprehensive and inclusive of the real human interests and expediencies is the Law of Allah, revealed to the Prophet Muhammad, the Final Messenger of Allah to mankind.

Primary Constituents of the Islamic Shariat

The shariat and the scheme for the human life which humanity received from its Creator and Master through the intermediary of the Messenger of Allah, Muhammad, may primarily be put in three parts, according to the following classification:

1. Beliefs, tenets and the articles of Faith. This part of the Islamic Shariat deals with the things like the Oneness of the Godhead, His Attributes, Apostleship and the necessary details of the things and events that are to take place in the life of the Next and the things belonging to the Unseen world beyond man’s perceptions and the range of his material knowledge, Like paradise, Hell, the existence of the angles, etc. On this paret has been raised the whole ideological edifice of the religion of Islam.

2. Purification of the self, reform and spiritual improvement of the personal character and the acquisition of high morals. This chapter includes the higher moral teachings and forbids the indulgence in un-Islamic moral traits and base desires. More precisely, this chapter of the Islamic teachings discusses how the man should behave as a person and an individual of the Islamic society and what are the duties and obligations he owes towards the society. This section of the Islamic Shariat entices man into adopting higher values and noble morality and purging himself of the base and animal desires and wishes. To name a number of the higher moral qualities: truthfulness, loyalty, integrity, trustworthiness, bravery and valiance, magnanimity and benevolence, fortitude and forbearance, redeeming one's pledges, giving preference to others on oneself, forgiveness, according good behavior to one’s parents and the kinsmen, being careful towards the rights of the neighborhood and being

---

[375] Kashaf, P. 292, Tafseer Kabir Vol., 6, P. 128

sympathetic with him, helping the poor and the destitute, showing kind and Loveful attitude towards humanity at large and being conscious to the rights of the human beings, treating all creatures with kindness and leniency and so on.

As regards the bad morals, they include lying, faithlessness, breach of trust, deception, breaking the solemnised promises, coverdice, egoism, conceitedness, miserliness, vanity, disobedience to one's parents and the elders, dublicity, hypocrisy, etc. This part of the Islamic shariah completes the fundamentals of the Islamic morality. The Holy Qur'an and Sunnah lay special emphasis on the teachings of this section. It needs not mention that the teachings of this sector play an incomparably greater role in the construction of the person of the Muslim.

(3) **Practical Commands** : These may roughly be put into two groups:

(i) The commands which discuss the nature of relations between Allah and man and are meant to regulate it. Its visible manifestations, for example, are the Namaz, Fast, Hajj, Zakat, Jihad, *nazr* etc. This type of the Divine commands is termed as worships, devotionals and *Ibadat*. By its very nature this type of commands are intended to near the man to Allah and create a close association between the Creator and the creatures.

Then in order to make those acts of worship acceptable to Allah *Taala*, there are some *wasail* and means which have been prescribed for the purpose and the worshipper is asked to equip himself with these qualities.

These are the following:

(a) Sincerity : The meaning and purport of sincerety, *ikhlas* is that all acts of worship and devotion must be carried out with the only object of seeking the pleasure of Allah and in total submission to His command completely free from all other motives and taints of hypocrisy and the worldly greed.

(b) Complete *iltifat* and *wholeheartedness* : This means that at all turns while carrying out he devotional acts the worshipper should deeply feel that he is always under the never failing eye of Allah, Who is seeing all his movements and nothing even his thoughts and the innermost feelings can elude His omnipotence and omnipresence and He is always with him.

This important theme has been expressed in the following verses.

هُوَ ٱلَّذِى خَلَقَ ٱلسَّمَـٰوَٰتِ وَٱلْأَرْضَ فِى سِتَّةِ أَيَّامٍ ثُمَّ ٱسْتَوَىٰ عَلَى
ٱلْعَرْشِ ۚ يَعْلَمُ مَا يَلِجُ فِى ٱلْأَرْضِ وَمَا يَخْرُجُ مِنْهَا وَمَا يَنزِلُ مِنَ ٱلسَّمَآءِ وَمَا
يَعْرُجُ فِيهَا ۖ وَهُوَ مَعَكُمْ أَيْنَ مَا كُنتُمْ ۚ وَٱللَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ ﴿٤﴾

It is He who created the heavens and earth in six days and then established Himself above the Throne. He knows what penetrates into the earth and what emerges from it and what descends from the heaven and what ascends therein; and He is with you wherever you are. And Allah , of what you do, is Seeing.[376]

وَمَا تَكُونُ فِى شَأْنٍ وَمَا تَتْلُوا۟ مِنْهُ مِن قُرْءَانٍ وَلَا تَعْمَلُونَ مِنْ عَمَلٍ إِلَّا
كُنَّا عَلَيْكُمْ شُهُودًا إِذْ تُفِيضُونَ فِيهِ ۚ وَمَا يَعْزُبُ عَن رَّبِّكَ مِن
مِّثْقَالِ ذَرَّةٍ فِى ٱلْأَرْضِ وَلَا فِى ٱلسَّمَآءِ وَلَآ أَصْغَرَ مِن ذَٰلِكَ وَلَآ أَكْبَرَ
إِلَّا فِى كِتَـٰبٍ مُّبِينٍ ﴿٦١﴾

It is He who created the heavens and earth in six days and then established Himself above the Throne. He knows what penetrates into the earth and what emerges from it and what descends from the heaven and what ascends therein; and He is with you wherever you are. And Allah , of what you do, is Seeing.[377]

The Apostle of Allah has expressed it in his following words:

---

[376] Al-Qur'an, 57:4.

[377] Al-Qur'an, 10:61.

"*Ihsan* being that you worship Allah as though you were seeing Him, so because much as you are not seeing Him, He is always seeing you.[378]"

(c) Showing diligence in offering the ordained acts of worship in their due times. This is because the man is completely unaware of the type the time of his death.

(d) *Being Completely free from duplicity*. That is to say, all the acts of worship should strictly be directed at attaining the only pleasure of Allah. Duplicity and all other motives of constitute the subforms of *Shirk*, invariably bound to destroy all the acts of worship and the hardworking undertaken. Laying emphasis on the supermost import of sincerity, the Holy Qur'an says:

قُلۡ إِنَّمَآ أَنَا۠ بَشَرٞ مِّثۡلُكُمۡ يُوحَىٰٓ إِلَيَّ أَنَّمَآ إِلَٰهُكُمۡ إِلَٰهٞ وَٰحِدٞۖ فَمَن كَانَ يَرۡجُواْ لِقَآءَ
رَبِّهِۦ فَلۡيَعۡمَلۡ عَمَلٗا صَٰلِحٗا وَلَا يُشۡرِكۡ بِعِبَادَةِ رَبِّهِۦٓ أَحَدَۢا ﴿١١٠﴾

Say, "I am only a man like you, to whom has been revealed that your god is one God. So whoever would hope for the meeting with his Lord - let him do righteous work and not associate in the worship of his Lord anyone."[379]

Should the above mentioned things are properly taken into account, the worshipper may expect that his worship will be attracting the Divine approval and acceptance. It is because of that Allah *Ta'ala* does not destroy the reward of the deeds of virtue offered by the virtuous people.

ii) The second category of the practical commands of the Shariah is that which is related to the different types of relationships binding the human beings. These commands and injunctions organize and oversee the whole edifice of the human society offering fuller guidance to all the family structure and the conjugal relations between husband and wife, marriage and divorce, bringing up the children and discipline them in lines with the Shariat and caring for their pecuniary and other obligations, torts and punishments, relationships between the citizens and the government, obligations of the government and other related political and non-political affairs. In short, the second type of the *practical commands* is intended to offer a fuller guidance for every turn of human life, and when used without a restricting adjective, the term *ahkam* generally refers to the same type.[380]

---

[378] Agreed upon, Mishkat, Book of Faith.

[379] Al-Qura'n 18:110.

---

[380] Ahmad Husain Farraj, Tarikh-al-Fiqhil-Islami P 8, al-Makhtae-al-Qanummiya, al Darul Jamia 1988)

CHAPTER 19

AN EXPOSITION OF THE ISLAMIC LAW

Fundamental Constituents of the Law of Islam according to modern terminology

As it has already been claimed and established, the Islamic Fiqh is a complete and prefect code of Life, containing full guidance for all needs of the human life, Leaving no aspect untouched, it offers guidance even for the pre-birth and the post-death periods of the human life.

A deeper look at the different types of the human needs and expediencies helps us to put all of them basically in three categories.

1. Relationship between the servant and Allah.
2. Relationship between individual and society.
3. Relationship between different countries and nations.

The law of Islam is fully inclusive of all these three departments, though not codified in separate sections like the man-made laws. A judge of the Islamic court may hear all types of the legal cases and pass his verdicts on them even in single session of the court.

Looking at the Islamic Fiqh from the angle of the varying human needs and differing expedienyies, if we analyze from them this viewpoint we may roughly classify it into eight sections, which cover the whole gamut of the human life. A shorter description of these eight sections follows:

1. Fiqh al-Usrah (the laws regulating family)

In this section are discussed the issues like marriage, divorce, *raza* (sucking-based relations, *hizanat*, maintenance, interdiction, wills, inheritance, guardianship, etc. The *Fuqaha* have discussed all such propositions in separate chapters. In the modern terminology this type of the legal issues is referred to as the personal laws.

2. Financial Dealings

Whether they are concluded between individuals or groups and whether they are civil or commercial in nature, all monetary dealing are covered under this section. The Fuqaha, generally speaking, deal with the matters of this type under the head of Kitab at Buyu (the Book of Sales) under different chapters such are *usury, salm, qard, (loan), Kafalah, wikalah, ijarah, sarf, muzaraah, ghasab, sulh, hawalah, wadiah, shuf'ah, ariyah, hibah, shirkah, mudharaah, taflis,* etc. Moreover, having mentioned their contemporary many civil, commercial and the sorts of partnership and the relevant juristic detailsthe Fuqaha have introduced the usage and custom (urf) as a principle stating therein a number of the general principles of basic value. In the light of those principles the emerging issues of the coming ages may be solved and the normative principles of the shariah may be applied to them in a proper manner.

3. Procedural Law of Islam

The term procedural law refers to the set of the laws which deal with the ways and procedures of dispensing with the familial matters, other dealings, etc. That is, the complete procedure from making the claim till the issue of the court verdict have been laid down under this section of the Islamic law. Such issues, generally speaking, have been laid down in the Book of *Iqrar* (acknoledgement). About these issues some men of great Islamic learning have prepared separate books, like Muinul Hukkam, Lisanul Hukkam, Tabsiratul Hukkam, al-Turaq al-Hukmiyah, etc. These works of high value explain the procedural system of Islam, how a case is to be filed in a court of Islamic law? When a claim is legally right and hearable by a court of law? (for instance, if the claim is made in the presence of the *qadhi*; the claim will be considered proper, otherwise improper, and other problems of the type. The Fuqaha have also written separate books on the organization of the judicial system of Islam which systematically discuss the provisions and the necessary standard required for the person to be appointed as *qadhi*, the limits of his jurisdiction, ways of his appointment, his duties and the principles and norms of issuing verdicts and dispensing with justice.

4. Special International Laws

Sometimes the Law suits may involve non-Muslims or the people of other countries entering into Darul Islam with the proper permission of it. In other words, disputes may arise between a Muslim citizen of the Islamic state and the foreigners, which might force them to seek a judicial solution to their disputes. In the corpus of the Islamic Fiqh such problems have been addressed under different separate chapters such as *Ahluz-Zimmah, mustamin, harbi*, etc. Furthermore, in the sections like *al-siyar, al-Jihad*, etc, the Muslim Fuqaha have laid down a number of comprehensive normative principles which may offer a very good legal mechanism to solve the disputes of the types erupting between Muslim and non-Muslim, Zimmis or otherwise.

5. The Constitutional Law

Under the constitutional law of Islam the problems discussed include the formation of the government, appointment of the administrative and judicial officers, ways of selecting the head of the state, the required competence, nature of relationship between the government and the public, the obligations the state owes towards its subjects, the citizens obligations and feelings towards the state and the principles of distributing the rights and responsibilities and assigning different types of work to respective people. Mostly, the Fuqaha deal with the juristic details of the type under the chapters like *al-siyar, al-jihad*, etc. Some jurists of note have prepared separate works in order to deal with these issues in a more detailed manner. Al-Siyasah al-Shar'iyah by Hafiz Ibn Taimiyah (d.728 Hijrah), al-Ahkam al-Sultariyah by Al-Mawardi al-Hambali (d.458 Hijrah), al-Turaqul Hukmiyyah by Hafiz Ibn ul Qayyim al-Juzi (d. 751 Hijrah), etc., include the important ones.

In the modern legal terminology this section of the law is termed as the 'constitutional law.'

6. Financial Law

Financial law deals with the issues and propositions relating to the financial system of the public exchequer and the state treasury, means and resources, heads of expenditure modes of spending, respective responsibilities etc. The Fuqaha, generally speaking, discuss all such issues under the headings like al-Zakat, al-Ushr, al-Kharaj, al-Rikaz, etc. Some Fuqaha have compiled separate books to deal with these issues in greater detail. Qazi Abu Yusuf, for instance, wrote his celebrated book al-Kharaj at the instance of the caliph Harun al-Rashid. Kitabul Amwal of Abu Ubaid and al-Kharaj of Yahya bin Adam al-Qarshi are from the eminent works on the subject.

7. International Law

By the term international law are meant those laws which operate between the countries and the relationships between the nations of the world. These laws discuss the nature of relationships between the countries in the states of war and peace and legal and moral responsibilities the parties owe under different states of peace and war. In the Fiqhi literature such issues have largely been discussed under headings like *Siyar, Maghazi, Kitab al-Jihad*. Separate books have also been written on those topics, *al-Siyar al-Saghir, al-Siyar al-Kabir* by Imam Muhammad bin al-Hasan al-Shaibani, al-Siyar of Imam Auzai, al-Radd ala Siyar al-Awzai etc., to mention a few.

8. *Uqubat* (Penal Code)

The details of the penal code of Islamic Shariah have generally been dealt with under the heads like *jinayat* (torts), *diyat*, (blood-money, qasama highway robbery armed rebellion), *hudood*, *tazirat* (punitive actions), etc. Many of the crimes have been left to be punished the discretion of Islamic state and the court of justice. For the purpose the normative fundamentals of Islamic shariat furnish the provisions and principles which help the Islamic court of justice in applying them to the new situations.

In short, the Islamic shariah is a perfect system of law, fully competent to meet all emerging situations even of the most modern age. Whether the problem is individual or collective, cultural or sociological, political or international Islamic law offers complete guidance for every walk of human life.

أَفَحُكۡمَ ٱلۡجَٰهِلِيَّةِ يَبۡغُونَۚ وَمَنۡ أَحۡسَنُ مِنَ ٱللَّهِ حُكۡمٗا لِّقَوۡمٖ يُوقِنُونَ ﴿٥٠﴾

Then is it the judgement of [the time of] ignorance they desire? But who is better than Allah in judgement for a people who are certain [in faith].[381]

---

[381] Al-Qura'n 5:50.

A Topic-wise comparison between the Islamic Law and the Contemporary Secular laws

A study of the corpus of the Islamic Fiqh makes it clear that the Islamic Fiqh contains two broad sections, that is to say: Devotionals and Dealings:

As far as the devotionals (*ibadaat*) are concerned, the main items of them discussed by Fuqaha in greater detail are the following ones.

(1) *Taharat* (attainment of purification). Under this heading the items discussed include the purification of water, different types of impurities, *wudhu, ghusl, tayyammum, haiz, nifas*, etc. (2) Namaz, (3) Zakat, (4) Saum, (5) Itikaf (6) *Janaiz* (funeral prayers and the related issues) (7) Hajj, Umrah, (8) Masjid and the related issues, (10) *Jihad*, (11) *Atima* and *Ashrah* (what is lawful and what is unlawful in the eatables and drinkables) (12) *Said* and *Zabaih* (the animals lawfully eatable and the related issues and details).

There are some *fuqaha* who have dealt with the last three items, that is, Jihad, *Ati'mah* and *Ashribah* and *Said* and *Zabaih*, under different chapters of *mu'amalat* (dealing)

Important subjects of the dealings

The important subjects of falling under the dealings include the following items:

- Marriage and divorce
- Penalties and punishments
- Sales, loans and borrowing, mortgage, *musaqat, muzara'ah, ijarah, hiwalah, shuf'ah, Ju'alah, sharikat, Qada, Awqaf, Hibah, Hajar, Wasiyyah, Faraiz.*

The Shafai jurists place the whole Fiqh under four comprehensive headings:

1. *Ibadat* (worships and devotional acts)
2. *Mu'amalat* (the commands and the directives of the shariah related to the worldy affairs and dealings aiming at the maintenance of the human life)
3. *Munakaha'at* (familial and household matters such as marriage, divorce and other related affairs)
4. Uqubat (the penal code)

Difference between the Devotionals and the Dealings

The detail furnished above demonstrates that the Fuqaha have generally classified the whole corpus of the Islamic Fiqh into two distinct parts: *Ibadat* (devtionals) and Mu'amalat (dealings). This classification has primarily been carried out with a compilation point of view. The reasons for this classification may briefly be put as follows:

1. Both the sections of the Islamic law have to serve two different purposes. To illustrate the point, the *devotionals* are primarily meant to seek nearness unto Allah, achieve a closer relationship with Him, and earn the reward in the Hereafter. The commands and the injunctions of this character all have been grouped by the Fuqaha under the title of Ibaadaat. The mua'amalat, on the other hand, are meant to secure worldly benefits by brining together two or more persons and/or groups and establishing social or other types of relationships between them. The injunctions of this type are equally important. The Fuqaha term them as *mu'amalat*.

2. The *devotionals*, as a matter of fact, are beyond the realm of human reason; a Muslim has to follow them as such. The secrets underlying the devotionals and their actual rationale, therefore, form part of the Divine knowledge, to the exclusion of human beings. As regards the explanations offered by some men of Islamic learning, they actually are not more than human assessments. In the realm of the devotionals, therefore, man has no other option than to unconditionally submit to Allah's commands. True devotion is the man's surrender to Allah and acknowledgement of his humility before him.

Mu'amalat and dealings, on the other hand, fall under the purview of human reason; it can comprehend the rationale and the secrets of the *mu'amalat*. The details of different aspects of *mu'amalat* are not necessarily dependent on the explanation of the shariah. In the pagan Arab society various forms of *muamalat* were is vogue. In Islam some sorts of them were retained as such, while some others were subjected to the required modification.

Islamic way of legislation is also indicative of the difference of nature between the *devotionals* and the *dealings*. The injunctions and the directions given in relation to the *mu'amalat* and dealings, for the most part are of fundamental and general nature, leaving their detailed explanation to the human mind and inference. In sharp contrast, the devotionals have not been left to the human explanation. Both the broad principles and the particulars have been furnished by the shari'at itself. This differentiation has no other reason than that the human reason has no say in so far as the area of *Ibadaat* is concerned. The broad principles were not enough to serve the intended purpose. The worldly affairs and the dealings offer a wider field to man for exercising his reason to determine their limits and explore the underlying rationale. Hence the broad principles and general rules were regarded sufficient by the Shari'at.

A yet another great difference between the devotionals of the dealings is that while carrying out the acts of devotions and worship the man, the addressee of both the *devotionals* and the *dealings*, is necessarily required to know it to be the command of Allah, and as such the intent forms a prerequisite for the validity of that act. Intent, on the other hand, is not a condition for the validity of any act belonging to the category of the dealings. Nor he is essentially required to recognize it as the Divine command. The intent may, however be requirement to secure reward from Allah. To illustrate the point in even clearer words, returning of a deposit to its actual owner, for example, needs not any intent; it is rather an act which has to be undertaken. All such social and business dealings may be contracted without manking a serious intent. The doer may, however entitle himself to a reward from Allah if he follows His commands governing the area of social affairs and business dealings as such. This being the *raison d'etre* why our Fuqaha have palced the Islamic Fiqh in two distinct parts.[382]

A nutshell analysis of different sections of the man-made legal systems

In order to draw a comparison between the Islamic law and the man-made systems of law it will be in order to cast a look at the primary sections of the latter. The whole contents of the man-made laws could be put into two broader sections.

(1) The Common law, and

(2) The Specific law

This division is primarily predicated on the concept of existence or non-existence of the state authority. Notably, the major part of the man-made laws centres round the concept of existence of the state. If the law admits of the state as a party and explains the nature of relationship between the individuals and the state with this aspect in view, the details of the legislation process shall fall under the category of the common law.

---

[382] For further detail *al-Madkhal Fi al-Ta'arif bil-Fiqhil Islami* by Mustafa Shibli P,15 16, also *Maqasid al-Mukallafin* by Dr. Umar Sulaiman al-Ash'qar

By contrast, if the law is about the matters taking place between the states, but is concerned only about the matters and relations between individuals, or takes into account the matters associated with the personal interests, the section of the law shall be termed as the specific law.

Then, the common law is further divided into two sections:

i. The internal or the municipal law
ii. The external or the international law

So far as the internal or the municipal law is concerned, it covers the portion of the law which discusses the rules and the principles concerning the constitution of the government, standards, methods, the nature of relationship between the individuals and the state and the responsibilities responsibilities and duties of each.

As regards the external or the international law, it stands for the set of the rules and principles which discuss the level and nature of the relations between the states and their concerned duties in both states of peace and war.

The internal law is again sub-divided into four sections:

i. Constitutional law
ii. Administrative law
iii. Financial law
iv. Penal law

The Specific law

The specific law stands for the set of the rules and the principles which discuss the matter and issues involving the state as a party. It deals with the general and civil relations amongst the citizens to regulate the affairs between the state and the individuals.

This has again been subjected to a further division as follows:

(1) Civil Law
(2) Commercial and Trade Law
(3) Maritime Law
(4) Labour Law

(5) Judicial Law (governing the civil and commercial matters)

(6) Specific International Law

Fiqhi Corpus and the Subjects of the Man-made Laws

There is hardly any subject contained by the man-made legal systems which is missing in the vast corpus of the Islamic *fiqh*. A scholar of the Islamic *fiqh,* therefore, is essentially required to know the places where those subjects could be found. So because the arrangement of the material of Islamic *fiqh* is profoundly different from that of the man-made laws. In order to conduct a scholarly study of the Islamic *fiqh* this knowledge is indispensable for the student of Islamic *fiqh* and to know the areas wherein the body of the Islamic *fiqh* and different subjects of the man-made laws could be found. Failing this knowledge, the student might form a mistaken assessment of the Islamic *fiqh* of falling short to contain the subjects of the human law.

International Law of Islam

Of all the areas of the Islamic *fiqh* the international law of Islam needs special attention and care of a scholar of the comparative laws. Here two important points are to be noted:

(i) It is a mistaken notion that the concept of international law owes West for its origin and development most of the western historians regard Hugo Grotius to be the father of the international law. His book *The law of war and peace* appeared first in the 1640 CE corresp. On ding to eleventh century of Hijrah. Before this book no separate book did exist in any western language dealing with the subject of international law. For the simple reason that the west was not in possession of any complete book on international law it hailed Hugo Grotius as the father of the international law. Strangely enough, much as the west's taller pretensions to knowledge, it failed to know the most outstanding fact of the history of knowledge that the Islamic jurists were able to prepare over a dozen of books on the subject of the international law almost nine hundred years before the appearance of the law of war and peace and its author Higo Grotius.

A number of the fundamental principles of the Islamic international law and its normative foundations exist in the Qura'n and the Hadith, the primary sources of the Islamic of the teachings and its legal system. Basing on those foundations, the Fuqaha have developed it as a separate and unique discipline of the Islamic *fiqh.*

(ii) In respect of the international law the second point of prime import is that throughout the whole of the human history it is the Muslim Fuqaha (Sig. Faqih) who first introduced the concept and substance of the international law to the world. Prior to the second century of Hijrah the concept was alien to the world that the law should have two parts : the Municipal law and the International law.

The first person, in the known human history who attempted to prepare a separate book on the subject of international law is Abu-Hanifa. He authored the book *Siyar Abi Hanifa* on this subject to deal with the legal problems in the perspective of the Islamic world. Unfortunately, the world lost this great book. Imam Muhammad bin Hasan al- Shibani, a very important among Abu Hanifa's direct students, is the first person whose three books have reached us al-Siyar al-Saghir, Al Siyar al-Wasit and al-Siyar al Kabir. All the three books are on the international law of Islam which Imam Muhammad authored and left to posterity. *Siyar* is the plural form of *Sirah*. Literally, *Sirah* means behavior and practical way of dealing. As a juristic term, the *Siyar,* in its plural form, denotes the attitudinal and behavioral ways the Muslims show and adopt in their dealings with and relations towards the other (people belonging to other faiths and creeds than Islam). Later on, the word *siyar* assumed the meaning of the set of principles and rules governing the Muslim State's behavior and relations with the non-Muslims, irrespective of that those non-Muslims live in or outside of the geographical boundaries of the Islamic state.

CHAPTER 20

THE NORMATIVE PRINCIPLES UNDERLYING THE INTERNATIONAL LAW OF ISLAM

Unity of all Human Beings

To the ideology of Islam all human beings stand equal-caste colour, natural and innate peculiarities offer no ground for superiority or excellence. It is only the quality of piety, God-fearing and ones moral perfection which offer the yardstick of ones superiority and excellence. This principle has been put in a very elaborate textual expression of the Qur'an itself in the following lasting words.

يَٰٓأَيُّهَا ٱلنَّاسُ إِنَّا خَلَقْنَٰكُم مِّن ذَكَرٍ وَأُنثَىٰ وَجَعَلْنَٰكُمْ شُعُوبًا وَقَبَآئِلَ
لِتَعَارَفُوٓا۟ ۚ إِنَّ أَكْرَمَكُمْ عِندَ ٱللَّهِ أَتْقَىٰكُمْ ۚ إِنَّ ٱللَّهَ عَلِيمٌ خَبِيرٌ ﴿١٣﴾

> O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted. [383]

Constructive Cooperation

Constructive cooperation between different human groups holds unparalleled import in the Islamic scheme of things. The term 'constructiv'e excludes all the sorts of cooperation meant for serving destructive purposes. The quote the Qur'anic textual expression in this regard.

Overlooking and Forgiving

On one hand, the Islamic Shariah grants the Muslims the right to repulse hostile activities of the enemy, it simultaneously places much emphasis on overlooking and forgiving the wrongdoings of the people and exercising maximum patience in the face of the adversaries on the other. Overlooking, in most cases, proves even more effective in improving things than punitive actions: to quote the Qur'an again:

---

[383] Al-Qura'n 49 : 13.

وَلَا تَسۡتَوِي ٱلۡحَسَنَةُ وَلَا ٱلسَّيِّئَةُۚ ٱدۡفَعۡ بِٱلَّتِي هِيَ أَحۡسَنُ فَإِذَا ٱلَّذِي
بَيۡنَكَ وَبَيۡنَهُۥ عَدَٰوَةٞ كَأَنَّهُۥ وَلِيٌّ حَمِيمٞ ﴿٣٤﴾

> And not equal are the good deed and the bad. Repel [evil] by that [deed] which is better; and thereupon the one whom between you and him is enmity [will become] as though he was a devoted friend.[384]

Freedom of Belief and Creed

Under the Islamic scheme of things every man has a fuller freedom to profess any creed and belief of his own will and choice and lead his life accordingly. Not so because Islam associates equal import and value to all religions, faiths and creeds. Such notion is entirely wrong and mistaken. Islam is the only religion which is acceptable to Allah and a precondition for deliverance and success in the lasting life of the Next. It is because of the fact that under a greater and wiser Divine scheme mankind has been granted liberty to choose, out of its free will, either the religion of Islam, the only religion of Truth revealed by Allah Himself to His messengers and prophets and secure the sure success in the Hereafter, or profess any other creed and thus fall into the trap of the Devil, the open enemy of all human beings. In this life of test and trial nobody, whosoever he might be, has a right to impose on others a creed of his own choice. 'No coercion in the matter of religion' is the most fundamental principle of Islam and its Shariah. The Qur'an has plainly puts it in the following verse:

لَآ إِكۡرَاهَ فِي ٱلدِّينِۖ قَد تَّبَيَّنَ ٱلرُّشۡدُ مِنَ ٱلۡغَيِّۚ فَمَن يَكۡفُرۡ
بِٱلطَّٰغُوتِ وَيُؤۡمِنۢ بِٱللَّهِ فَقَدِ ٱسۡتَمۡسَكَ بِٱلۡعُرۡوَةِ ٱلۡوُثۡقَىٰ لَا
ٱنفِصَامَ لَهَاۗ وَٱللَّهُ سَمِيعٌ عَلِيمٌ ﴿٢٥٦﴾

> There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most

---

[384] Al-Qura'n 41: 34.

> trustworthy handhold with no break in it. And Allah is Hearing and Knowing.[385]

As regards the *jihad*, which unfortunately continues to be a very misunderstood doctrine of the Islamic Shai'ah, is never intended to impose the religion of Islam on others contrary to their volition; its sole aim is to put an end to the state of religious persecution and pave the ground for a peaceful way of Islamic preaching to all peoples and nations of the world. The forces not willing to give a safe passage to the preachers of Islam cannot be allowed to impede the process of the Islamic preaching. This removal of such impediments is a very important aim of the jihad.

Indiscriminate Justice

The Islamic Shariah commands the Muslims to remain always clung to the principles of right and justice with lest respect to the conditions and the state of affairs, whether it is peaceful or disordered, and whether the other party is friendly or hostile. The law of Islam recognizes no consideration to make any discrimination in meting out justice to different human groups. To quote the relevant verses of the Qur'an:

۞ يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ كُونُواْ قَوَّٰمِينَ بِٱلۡقِسۡطِ شُهَدَآءَ لِلَّهِ وَلَوۡ
عَلَىٰٓ أَنفُسِكُمۡ أَوِ ٱلۡوَٰلِدَيۡنِ وَٱلۡأَقۡرَبِينَۚ إِن يَكُنۡ غَنِيًّا أَوۡ فَقِيرًا
فَٱللَّهُ أَوۡلَىٰ بِهِمَاۖ فَلَا تَتَّبِعُواْ ٱلۡهَوَىٰٓ أَن تَعۡدِلُواْۚ وَإِن تَلۡوُۥٓاْ أَوۡ
تُعۡرِضُواْ فَإِنَّ ٱللَّهَ كَانَ بِمَا تَعۡمَلُونَ خَبِيرًا ﴿١٣٥﴾

> O you who have believed, be persistently standing firm in justice, witnesses for Allah , even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.[386]

---

[385] Al-Qura'n 2:256.

[386] Al-Qura'n 4:135.

> O you who have believed, be persistently standing firm for Allah , witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah ; indeed, Allah is Acquainted with what you do.[387]

These being the fundamental normative principles which shape the core of the international law of Islam and which underlie all its legislation of the international character.

After these primary points now begins a systematic discussion of the international law of Islam.

International law operates between independent and sovereign states. It does not deal with relations between nations. And yet it did not begin with states but individuals, Every individual in the olden days was an autonomous unit. The individuals formed families and clans. Relations between autonomous and equal clans were governed by laws. Clans formed a large unit called a tribe. The leader of a tribe could declare war on another tribe. Had the power to make war and peace and enter into treaties and alliances. In short, In short, he performed all the functions usually associated with a state which has its characteristic attributes. But our scholars somehow ignore that period of human history and begin with the period when a state, however small it may be, had come into existence.

A state first came into being in the shape of a city. European scholars start with city-state perhaps because such units once existed in Greece. They had relations with each other both in times of peace and in war. But the city-state was not peculiar to Greece. It was found everywhere in the world. Even in Arabia we see city states before Islam. There were tribes as well as cities. Tribes did not have a settlement in which they could stay all the year round. On the contrary, there were cities whose people did not lead a nomadic life. In Arabia we see both city-states and the tribal system existing side by side. A similar situation perhaps obtained in Greece in an earlier period but Western historians begin the story when a city-state had already come into existence.

In ancient Greece, the nature of inter-state relations was such that their dealings with each other could not be called 'international law'. All Greeks belonged to one race. They spoke the same language. They professed the same faith. But they lived in different cities, and each city enjoyed complete freedom and sovereignty. They fought battles and engaged in warfare with each other.

---

[387] Al_Qura'n 5:8.

According to Western writers, the laws of these city-states were confined to dealings with Greeks only. A Greek city followed certain laws in dealing with another Greek city, but the Greeks were not governed by any code of law in their dealings with the rest of the world. They used their discretion and adopted different courses of action in dealing with different people outside their country.

The Greek international law suffered from a serious drawback for it was confined to a few people and ignored the rest of the world which was considered barbaric and was not, therefore, worthy of being treated in accordance with law. The laws which they devised to deal with their own compatriots were fairly barbarian but in any case they had a fixed code. It is on this basis that we accept the premise that the oldest example of interstate relations is found in Greece, where independent and sovereign city-states conducted their affairs during war and peace in accordance with fixed law which were really not international law as such.

After the Greek city-states Western historians deal with the Roman era in the context of international law. City-states no longer existed in the period. Rome, which started as a city-state, had by then become that capital of a vast empire which comprised Europe, North Africa and parts of Asia. The Roman period saw both war and peace but sill it was not suitable for international law because, according to Western writers, the Roman Empire respected law only in its dealings with states with which it had a treaty relationship and not with the rest of the world which was governed by mere discretion.

An example will perhaps help explain the situation. during the early Roman period a formal declaration of was was considered necessary before engaging in warfare. The rule followed in this regard was that an army would reach an enemy's frontier and stop there. A priest or a religious leader would then take a spear and fix it in the enemy territory. This was considered a declaration of war. Later when the empire expanded, and it took several weeks to reach the enemy frontier, the priests hit upon a plan to avoid inconvenience to themselves. The soil of various lands was collected into bags which were deposited in the state treasury in Rome. Whenever it was considered necessary to declare war against a certain country, its bag was taken out and the priest most solemnly thrust a spear into it.

The Roman period was not congenial for the development of international law. It had rules about war and peace but they were not the same for everyone. Oppenheim, the well-known authority on international law, remarks that it is neither necessary nor possible to discuss the relations of the Romans with other countries. His opinion is based on the Roman claim that the world was a Roman sphere and belonged to them. No one needs international law in one's own territory. It is on this account that Oppenheim states that the question of international law did not arise in the Roman period.

Western historians begin their account of international law with the emergence of the city-state, proceed to the Roman period and then jump a thousand years ahead to reach the Renaissance era in the fourteenth or fifteenth century CE when the modern international law is stated to begin. And yet it is not international law at all. Until 1856, the So-called international law dealt with the Christian states only. It was not considered necessary to follow fixed laws in relation to non-Christian states.

In 1856, the European states for the first time felt obliged to apply the same law to a non-Christian state i.e. the Ottoman Empire. After that there was a gap of nearly sixty years. The second non-Christian state which was considered worthy or this treatment was Japan which defeated Russia in 1905. The First World War broke out a little later. During this war a few other states were considered worthy of the same treatment. But these states had to fulfil certain conditions before they could be admitted into the League of Nations was replaced by the United Nations Organization. Every country cannot, in its own right, claim its membership. At least two states which are already members of the Organization have to sponsor the candidature of a new country. The sponsor have to verify that the state in question is a civilized country and acts on international law and deserves, therefore, to be treated in accordance with it.

International Law Began with Islam

If international law is a law which is equally applicable to all countries of the world and is not confined to a few specific nations, then it originated with the advent of Islam, and Muslims are perhaps the only nation in the world which can legitimately claim to possess and international law. An international law which is both truly 'international' and 'law' began with the Mulims.

The status of Islam in the beginning was the of a state within a state in Makkah. Muslims lived in the city-state of Makkah but they did not consider themselves obliged to obey the old laws of the city nor city nor did they give allegiance to its ruler. They obeyed their own leader, the Prophet of Islam (peace be upon him), and turned to him for guidance. They had their own laws and their own administrative arrangements.

After their migration to Madinah they founded a state and framed a constitutions for it. We do not know how ancient states were founded but we know exactly how the state of Madinah came into existence. On reaching

Madinah the Prophet (peace be upon him) found that it was inhabited by many tribes which had been fighting with each other for nearly a hundred and twenty years. There was no central authority, no organized system, no government. The Prophet (peace be upon him) proposed to the people of Madinah that they should organize themselves for purposes of defence and justice and choose their own leader. The proposal was accepted by the local populace and the tribes. A question arises as to how the Prophet (peace be upon him) was selected for leadership while the Muslims were still in a minority in Madinah.

There were two kinds of Muslims in Madinah i.e. those who belonged to the city, and those who had migrated there from Makkah. The majority of the city's populations, however, comprised those who had not yet embraced Islam. There were Jews as well as a sprinkling of Christians. The diversity and differences notwithstanding, the people of Madinah elected the Prophet (peace be upon him) as their leader. The reason was that the tribes of Madinah were at odds with each other. It was impossible for them, therefore, to elect a leader from among themselves who would be acceptable to all the tribes. So they decided to opt for a neutral person. They elected the Prophet (peace be upon him) as their leader. The rights and duties of the ruler and the ruled were reduced to writing in detail, and a legal document was prepared. This is the document which can be called the constitution of the city-state of Madinah.

The document which has reached us contains considerable detail about domestic administration. The right of religious freedom is clearly affirmed. Defence arrangements have also been spelled out together with laws of war and peace.

Soon after the establishment of the state of Madinah, Muslims were confronted with a war. In 2 AH the city-state of Madinah was invaded by the city-state of Makkah. International law usually deals only with two things i.e. war and peace. The Prophet (peace be upon him) had enjoyed peace only for a few months after formation of the state when he was confronted with a war. Many a problem had to be resolved and decisions taken. Many a question had to be answered; for instance, should war be declared? And after the war ended it had to be decided whether only adults capable of bearing arms should be killed, or should the same fate be meted out to all enemy men, women and children? Should the enemy be killed only in the battle-field? How is one to treat prisoners of war? Should they be executed or released with or without ransom? Should an exchange of prisoners of war take place? If so, how?

Scores of questions relating to the conduct of war had to be answered. The practice and pronouncements of the Prophet (peace be upon him) provided the guidelines for the law which came into being and thus was born the concept of the Islamic international law. In this law there is no distinction between the Muslim and non-Muslim aliens. Everyone is treated according to the same law irrespective of the fact whether he is Muslim, Jew, idol-worshipper or a man without any religion at all. For example, if a declaration of war is considered necessary, this applies to all states irrespective of their religion or faith.

It was during the ten years of the Prophet's stay in Madinah that the international law of Islam came to be formulated. When books began to be written on the subject, Muslim scholars naturally referred first to the Holy Qur'an, or else they discussed the words and deeds of the Prophet (peace be upon him). Islamic international law belongs to the Prophet's period of Madinah. The Makkan period does not provide us with an equally valid source because Islam was not free there, let alone being a state. Muslims fought no war during this period even though they were persecuted and subjected to inhuman and savage types of torture.

When Muslim scholars started writing on jurisprudence their concept was much wider than that of Western writers. Pick up any Western book of law and it will be found utterly lacking in dealing with questions relating to worship. The Muslims made their law very comprehensive and dealt with both the physical and spiritual life of man. When Muslim jurists compile a code of law, it includes worship, civil and military affairs, inheritance, etc., together with international law. Even though they call the subject *Siyar* (literally biographies), it deals invariably with international law.

Early Works on International Law

The oldest book of jurisprudence we have today is Imam Zayd ibn 'Ali's *al-Majmu' fi' l-Fiqh.* Imam Zayd, the grandson of Husayn and son of *Zayn* al-'Abidin, is the founder of the Zaydi sect. He was a great scholar. A chapter on international law is included in his book. The chapter is called, *Kitab al-Siyar*. The word Siyar in Arabic is the plural of Sirah. The famous Hanafi jurist Imam Sarakhsi has stated in his book, *kitab al-Mabsut*, that by *siyar* is meant the attitude adopted by the ruler towards aliens in the state of war and peace. he adds that in addition to aliens, such a law would apply to two categories of citizens as well i.e. apostates and rebels. Thus the concept of international law in Islam is wider that the one found today in the West. Zayd was the first to use the expression *Siyar* in the sense of international law and since his days the term has remained current without any disagreement. Every author – Hanafi, Shafi'I, Maliki, Hanabli, Shi'i- has used the same expression with the sole exception of the

Khawarij. In their book of jurisprudence, which we have secured with great difficulty, the chapter on international law is entitled *Kitab al-Dima*, that is the "Book of Blood" because it deals with war.

In short, the earliest extant work on the subject is Imam Zayd ibn 'Ali's book. In a sense, he is considered the teacher of Abu Hanifah. Zayd rebelled against the Umayyads but his supporters let him down. He was arrested and executed and executed in 120 AH and Abu Hanifah died in 150 AH. Between 120 AH and 150 AH, Abu Hanifah wrote a book called *kitab al-Siyar*. Its history is interesting. In it he expressed the opinion that armed rebellion against a Muslim ruler was in order if all other ways and means to seek redress had failed. Other jurists hesitated go give such a verdict. No only that, they rejected the verdict of Abu Hanifah and wrote books in refutation of the theme. Abu Hanifa's verdict was based on a *hadith* which said that if someone saw an evil, he should alter it by force. If, however, he was not strong enough to change it by force, he should, at least, offer verbal opposition to it, i.e. he should try to change it through persuasion. If it is not possible for him to do so either, the last he can do it to look upon it as an evil. One who come across an evil and does not consider it as such even in his own mind is not a good Muslim, for this is the weakest manifestation of faith. This is how Abu Hanifah argued in support of his opinion.

Other jurists, who opposed him and held that rebellion against the government was not permissible in law, based their argument on another tradition which said something to this effect: "If the ruler dispenses justice to you, be grateful to God and be patient in case he indulges in tyranny". We are faced with a situation in which we have two apparently conflicting traditions on the same subject even though the context of each is different. Abu Hanifah, of course, does not advocate resort to rebellion against authority on trivial matters. On the contrary, he lays down the proviso that all peaceful avenues should be thoroughly exhausted before resorting to arms.

Imam Awza'i, in his contemporary, wrote a refutation of Abu Hanifah's work on international law. Unfortunately we have neither the work of Abu Hanifah in its original form nor its refutation by Awzai. All that we have are excerpts from the two works in Imam Shafi'i's book *Kitab al-Umm,* which throw light on issues on which the two jurists disagreed. When Awza'I,a jurist of Damascus, wrote a tract on the work of Abu Hanifah, a jurist of Kufah, the latter did not consider it appropriate to answer the criticism. His pupil, Abu Yusuf, undertook the task. His book, too, is not available in original but is mentioned in excerpts of Imam Shafi'i' Kitab al-Umm.

Based on these extracts, a book was published not long ago in Hyderabad, Deccan. It gives some idea of the view points of Abu Hanifah, Awza'i' and Abu Yusuf. Thanks so Shafi, a good part of these rare books has been preserved, although those have not reached us in their entirety. In this connection Ibn Hajar, the biographer of Imam Shafi'i has commented in *Tawali l-Ta'sts* that Abu Hanifah was the first to write book on *Siyar*. Imam Awzai responded with his book which was in turn refuted by Abu Yusuf. Shafi'i then commented on Abu Yusuf's work in his book *Kitab al-Umm*. This is the background of the early works on international law.

Contribution of Abu Hanifah and his Students

Although Zayd ibn 'Ali was the first to take notice of the subject, his book contains only one chapter on international law. Abu Hanifah is the first to produce an independent work on the subject. He must have taught the discipline to his students. He used to first give an exposition and then would invite the views of his students. A discussion ensued and different aspects of the problem became clearer. With the help[of excerpts from his lectures one could compile a more comprehensive book.

Unfortunately, the original work of Abu Hanifah has not been preserved. We reckon it was no more than a brief tract of some twenty or twenty-five odd pages. We have, however, with us the books of his pupils like Shaybani, Zufar and Ibrahim al- Fazari. At lest two of them, i.e. Shaybani and Fazari, have written hundreds of pages on the subject. We think that possibly the lectures of Abu Hanifah were taken down by his students and they were later attributed to the students who compiled them. The manuscript of Fazafi's work, which is in Kufic script, is preserved in Morocco.

Muhammad ibn al-Hasa al-Shaybani, one of the students of Abu Hanifah, has written two books on the subject, viz. Kitab al-Siyar al-Saghir and Kitab al-Siyar al-kabir. When the former was written, Imam Awza'i is reported to have commented: "How dare the Iraqis write on the subject while they know so little of Hadith"? When he came to know about the comment, Shaybani wrote Kitab al-Siyar al-Kabir. It was so voluminous that it had to be carried in a cart to Baghdad for being presented to Caliph Harun al-Rashid. We have received this work in the form of a commentary. Sarakhsi, the famour Hanafi jurist of the fifth century of Hijrah. is the author of the commentary. The conditions in which he wrote it were indeed dramatic.

Imam Sarakhsi was an extremely intelligent, erudite, honest and fearless jurist. He was imprisoned presumably because of a verdict he gave against the imposition of unjust taxes by the contemporary rulers. In view of his reputation as a great jurist the government could not dispose him of but kept him in a dry well. During the fourteen years of his detention in the well he somehow secured the permission of his captors to allow his pupils to sit on the wall of the well and take down his lectures.

One is indeed surprised to see the long list of monumental works produced during those fourteen years of imprisonment. Kitab al-Mabsut has been published in thirty volumes. This was dictated from within the well. The commentary on al-Siyar al-Kabir of Shaybani, which is in four volumes, was also dictated from the well. No less than a dozen works were dictated in this manner by the celebrate jurist during his imprisonment. We, who are free, should learn a lesson from the example of the great scholar who continued his work even in the dry well, where he was not allowed to keep a single book, and yet bequeathed to posterity a wealth of scholarship.

One of his many works is Sharh al-Siyar al-Kabir, which is on the subject of international law. It could not have been written without the requisite references. The master was confined to the well but the students were free. Perhaps they read aloud from the books from without and the Imam dictated the commentary from within the well. This is how he also dictated the thirty volumes of Kitab al-Mabust.

Sarakhsi's Sharh al-Siyar al-Kabir was published in 1335 A.H. from Hyderabad, Deccan but unfortunately no new edition of the work in its fullness has come out since. An attempt was made in Egypt to publish a new edition, but till new only four volumes have been published which cover less than half the book. In view of the importance of the book, UNESCO has decided to bring out a French translation.

Other Eminent Jurists

Muhammad ibn al-Hasan al-Shaybani's book occupies an important place in the history of international law. Among his contemporaries, Ibrahim al-Fazari, A student of Abu Hanifah, also wrote a book. Other eminent jurists have made similar contributions. Malik wrote a book under the same title Kitab al-Siyar. Unfortunately it is no longer available. His work al- Muwatta' devoted barely half a page to this subject which is obviously not enough to meet our requirements. Another contemporary of his, the famous historian Waqidi, also wrote a Kitab al-Siyar but that too is not available. In Shafi'I's Kitab al-Umm, however, there is a lengthy extract of some fifty odd pages from Siyar al-Waqidi.

These were the last as well as the earliest full-length books on international law. They were produced in a certain period perhaps for a particular requirement. But the Muslim interest in the subject continued unrestricted. All the books written on the subject from the olden times until today contain a chapter called Kitab al-Siyar. All authors, irrespective of their affiliation Hanafi, Shafi, Maliki, Hanbali, Shi'I, Fatimi – agree on international law which carries no sectarian stamp. All jurists base their work first on the Qura'an and then on the Sirah i.e. the life of the Prophet (peace be upon him). All books written during the last 1300 years by authors belonging to different schools include a chapter on Kitab al-Siyar. Even the work which is considered an abstract of all the books which were used during Aurangzib's days are no longer available but extracts from them are to be found in the *Fatawa*.

In all these books the same principles have been followed. The authors naturally take into account the special circumstances obtaining in their country or those that they themselves encountered. This fact gives each author's work its special characteristics. Sarakhsi, for example, refers to soldiers riding on bulls during a battle. Such a battle obviously took place in a country which had bulls, an animal not seen in a an Arab battlefield. Maliki authors from North Africa and Spain frequently refer to poisoned arrows which are not mentioned in books written by non-Maliki writers, for the simple reason that this practice did not exist in other places. In the books written by Sarakhsi we come across the mention of carriages for carrying loads, instead of beasts of burden which perform the same function elsewhere. In short, peculiarities of different regions are evident from the contents of the works on international law. However, they do not detract form the similarity of the general approach to the subject.

Contents of Inernational Law

Let us turn now from these details to the contents of international law. In our day, public international law and private international law are considered different disciplines, but Muslim jurists do not make any distinction between the two, and discuss both in the same chapter. Private international law deals with the relations of a government with the subjects of another state while public international law is confined of inter-state relations.

This is the basic difference between the two disciplines. For example, problems relating to the law on nationality will be dealt with in private international law. Muslim scholars include the relations of various Muslim sects into this law. For example, they discuss Shi'i-Sunni relations from the legal point of view. Suppose an inheritance case comes up in a court of law. The deceased was a Shi'i while his widow is a Sunni. Which law will determine the share of inheritance? This problem will be determined by the private international law of Muslims. Suppose again that a Muslim individual who is the subject of a Muslim state has entered into a commercial contract with an individual of an alien state. The law of the alien state lays down that an individual who is less than eighteen years of age is not entitled to enter into a contract while the Muslim law does not prescribe any specific age limit but speaks merely of physical maturity which is possible before the stipulated age of eighteen years. The case comes up in a court of law. A counsel argues that his client had not come of age at the time of signing the contract, and therefore, no responsibility devolves on him and the contract should, therefore, be declared null and void. Such cases belong to private international law.

Public international law, contrariwise, deals with three subjects, viz. law of peace, law of war, and law on neutrality. The law of peace mostly deals with three or four issues. Sovereignty is the first. Which country should be considered sovereign? Modern international law includes rebels in it but only when they begin to control and administer an area of the country on their own. Similarly, the law deals with details of sovereignty. In British India, for example, there were areas which were ruled directly by the British government and there were states which ruled by princes e.g. Hyderabad, Bahawalpur, Kashmir etc. Will these states be considered sovereign for purposes of international law? If so, what will be the rules governing them? Even if a state enjoys partial sovereignty and has the right to send out an ambassador to one country, it will be subject to international law. In short, such subjects are discussed under sovereignty.

Another subject is "property", which mostly deals with conquests. Does part of a state conquered by another automatically become part of the victor country or does it require some formal procedure? If so, what would it be? The discussion on property will also deal with the sale of property. A state acquires land, sometimes by conquest, sometimes by exchange of territory and sometimes as a gift. We come across many example of it in Indian history. Two rulers quarrel over a piece of land. At last a compromise is reached on the basis that the territory concerned would be ceded to the ruler as a dower for his son who marries the daughter of the other ruler.

Yet another topic which is dealt with in public international law is jurisdiction. Will the laws of one state be applicable to the subjects of another state? And if they are, then the extent of their application is to be determined. In this connections we should like to refer to Shaybani's al-Siyar al-Kabir which has an interesting chapter on this subject. He state that in the event of an alien filing a suit in a Muslim state, the court will apply laws prevailing in the state of the alien.

Suppose, for example, two Indian Hindus came to Pakistan. They had a quarrel between themselves. One of them approached a Pakistani court. In such a situation the law of India and not that of Pakistan will apply. It is in this connection that Shaybani states that Muslim judges need to acquaint themselves with the laws of alien lands. He quotes example from the days of the Prophet (peace be upon him). He writes, for instance, that in Madinah some Jews came to the Prophet (peace be upon him). They had with them a Jewish couple who were accused of adultery. The Prophet (peace be upon him) enquired about the Jewish law applicable in such cases. The Jews tried to mislead the Prophet (peace be upon him). They said that the face of the person found guilty was to be blackened and he was to be paraded through the town in a procession, riding a donkey with face backwards, to the accompaniment of drum-beat. The Prophet (peace be upon him) did not accept the statement and asked for a copy of the Torah. When it was brought to him he asked the relevant portion to be read out in the presence of 'Abd Allah ibn Salam, a Jewish convert to Islam. A Jew began to read it. He put his finger at one place on the page. 'Abd Allah ibn Salam asked him to remove the finger and to read the words he was trying to hide. It was written there that the penalty for adultery was stoning to death. The Prophet (peace be upon him). therefore, pronounced this penalty. This example shows that Islamic law is not always applicable to aliens for they are subject to their own law. Shaybani has devoted many pages to a discussion of this issue in his book.

The law of pace concerns embassies. In the old days there were no permanent ambassadors. They were assigned for a specific purpose to a country for a limited period of time and returned home after concluding their mission. Syed Ameer Ali in his *History of the Saracens,* has stated that the institution of permanent ambassadors was created by Muslims two hundred years before Europe adopted it.

The subjects discussed under the law of war include the law of war in respect of human beings, the law governing property, and the constituents and qualities of a treaty concluded at the end of a war.

In short, international law covers principles and regulations governing the relation of one state with another.

CHAPTER 21

CONCEPT OF WAR IN ISLAM AND UN-ISLAM AND THE CAUSES LEADING TO WAR

The war has variously been defined. Traditionally, the war, as defined by the men of ht international law, is an armed conflict between two states or between the two sections of the states. According to this definition the application of the term 'war' is restricted to an armed conflict between the states. As for the fighting which sometimes breaks out among different groups living within the territory of the same state, or a fighting undertaken by a group of people against an alien state is not termed to be war and the international law has nothing to do with such a fighting. Rather, it is subject to the panel code of the state concerned. A fighting, likewise, undertaken by a rebelling province against the State fall under the political domain of, or a fighting undertaken by state member of a federation against the central government is not termed to be war. [388]

This being the traditional definition of war. The modern tendency, however, is bent upon extending the application of the term 'war' to include all conditions in which an armed fighting is obtained even if it lacks the elements of the former definition. Rather, the principles of the military law shall be applied to it even though the fighting is among the groups lacking the status of the State in terms of the international law, as has been the case with the fighting between the Arab states and Israel, in spite of the fighting Arab states do not recognize Israel as a state?[389]

Definition of war in the Law of Islam

As far as the definition of war in the law of Islam is concerned, it stands for a lawful just war which intends good for humanity at large, honest and noble in its inception, in the means it adopts for the purpose and in its ending, It is fought for the survival of the Muslim community or of some Muslims (detached from their mainstream) and defending their sovereignty, aiming no material conquest, territorial expansion or uglier imperialism.[390]

---

[388] Dr. Hafiz Ghanim: *Mabadiul Qanun al-duali al-Aam* (1961 p.641)

[389] Op. Cit P. 564

[390] S.Rashid Raza. Tafseerul Manar. 2/207

As a matter of fact, Islam has a worldwide approach in so far as the establishment of peace is concerned. This approach is founded on the concept of moral nobility. The religion of Islam is essentially the religion of peace and mercy for all people and communities of the world. Islam's this unique concept of peace is best reflected in the words of Umar b. as As by which he addressed the commander of the roman forces at the battle-field of Ajndeen in Palestine.

> "I call you to accept Islam; if you decline it, then to the submission and the payment of Jizya. If you reject even this potion, then war and only war is the last resort. We are callers to Islam and peace, and undertake war and jihad just for the sake of Truth and to raise the word of Allah high."

According to this approach to peace the war turns out to be a social need so as to establish and strengthen peace, once the freedom of religion is established and the human equality is achieved. Going by the law of Nature 'survival for existence,' Islam again the religion of Nature (Fitra), faces the truths of the human nature rather than fleeing from it.

Causes of war as reflected in the Law of Islam

As far as the causes of war are concerned, they may broadly be put under more heads than one. In the following lines we are going to discuss them in a fairly detailed way.

Defensive war

The Qur'an exhorts the Muslims to exercise maximum tolerance and patience in the ace of what they receive unfair treatment on the part of the people of disbelief and untruth and treat them with ignorance. But never Islam permits them to tolerate an aggression which targets the religion of Islam or is intended to destroy it, impose on Muslims a religion other than Islam, or a law opposed to that of Islam, disrupt the law and order and peace of land, to deprive the Muslims and non-Muslims at large of their fundamental human rights, subject them to oppression and atrocities, to drive the people out of their lawful properties, subject the people to religious persecution or lets not the Muslims live a religious life as demanded by their religion. If the Muslims are confronted with such and adverse situation when their religious freedom and human rights are at stake, the Qur'an asks them never to have a nerveless attitude to such a situation but to repel it with the firmest determination using whatever means and might they have at their disposal. To quote the Qur'an, the primary source of the Holy Prophet's war ethics and the law of Islam in this regard:

وَقَٰتِلُوا۟ فِى سَبِيلِ ٱللَّهِ ٱلَّذِينَ يُقَٰتِلُونَكُمْ وَلَا تَعْتَدُوٓا۟ ۚ إِنَّ ٱللَّهَ لَا
يُحِبُّ ٱلْمُعْتَدِينَ ﴿١٩٠﴾

وَٱقْتُلُوهُمْ حَيْثُ ثَقِفْتُمُوهُمْ وَأَخْرِجُوهُم مِّنْ حَيْثُ أَخْرَجُوكُمْ ۚ وَٱلْفِتْنَةُ أَشَدُّ مِنَ
ٱلْقَتْلِ ۚ وَلَا تُقَٰتِلُوهُمْ عِندَ ٱلْمَسْجِدِ ٱلْحَرَامِ حَتَّىٰ يُقَٰتِلُوكُمْ فِيهِ ۖ فَإِن قَٰتَلُوكُمْ
فَٱقْتُلُوهُمْ ۗ كَذَٰلِكَ جَزَآءُ ٱلْكَٰفِرِينَ ﴿١٩١﴾

فَإِنِ ٱنتَهَوْا۟ فَإِنَّ ٱللَّهَ غَفُورٌ رَّحِيمٌ ﴿١٩٢﴾

وَقَٰتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ ٱلدِّينُ لِلَّهِ ۖ فَإِنِ ٱنتَهَوْا۟ فَلَا عُدْوَٰنَ إِلَّا
عَلَى ٱلظَّٰلِمِينَ ﴿١٩٣﴾

ٱلشَّهْرُ ٱلْحَرَامُ بِٱلشَّهْرِ ٱلْحَرَامِ وَٱلْحُرُمَٰتُ قِصَاصٌ ۚ فَمَنِ ٱعْتَدَىٰ عَلَيْكُمْ
فَٱعْتَدُوا۟ عَلَيْهِ بِمِثْلِ مَا ٱعْتَدَىٰ عَلَيْكُمْ ۚ وَٱتَّقُوا۟ ٱللَّهَ وَٱعْلَمُوٓا۟ أَنَّ ٱللَّهَ مَعَ
ٱلْمُتَّقِينَ ﴿١٩٤﴾

Fight in the cause of Allah those who fight you, and do not transgress. For Allah loves not the transgressors. And slay them wherever you catch then, and drive them out from where they have driven you out. And persecution is they fight you; but if they right you, you too fight them; such is the reward of the unbelievers. But if they desist, Allah is the Most Forgiving, Most Merciful. And fight them on until their is no more persecution and the religion becomes Allah's. But if they cease, let there be no hostility except to the wrong doers. The sacred month for the sacred month and the sanctities should be regarded in kind. So if any one attacked you, you, too,

> attack him n the same measure; and fear Allah, and know that Allah is with those who fear Him.[391]

The imperative of defending the religion of Islam and Islamic State against the aggression meant to destroy Islam and divest it from its sovereignty turns out to be an all-binding obligation for the Muslims to face the threat unitedly, renouncing all their worldly businesses and take no rest unless the threat is averted, and the hostile forces repelled. There is a general consensus amongst the different schools of the Islamic *Fiqah* that in the event of falling the *Darul Islam* under an aggressive attack from an enemy, all Muslims shall fall under obligation to bear arms and defend the *Darul Islam,* as definitely as they are charged with offering obligatory duties of Islam like *salat, saum.* To quote here an authority:

> "If it is announced (on the part of the head of the Islamic State) that the enemy has attacked the Islamic State, the fighting shall turn an all-binding obligation for all the able bodied Muslims. In fact, in the event of the general call the all-binding duty of defending the Islamic State against the hostile aggression will not be regarded fulfilled unless undertaken by on and all. Under such circumstances the mar turn out as much as all-binding duty on all Muslims as the prayer and fasting. So, the slave will not be required to seek permission of his master, and the woman of her husband, because the obligatory duties supersede the rights of the master and husband, as being the case of the prayer and fasting. A son, in the same manner, shall not be required to ask permission of his parents, because of the fact that the parental rights can not affect the obligatory duties of the Shariah like prayer and Fasting."[392]

Every word of the quotation is suggestive of the extraordinary importance of defending Islam, Muslims and the Islamic sovereign State. For a fuller freedom of thought action sovereignty is the most essential thing for Muslims to lead a life sovereignty and freedom is lost, the Muslims shall not be able even to properly maintain the the supremacy of the law of Allah on their own social order, the backbone of their religious life, let alone discharging their nobles responsibility they have been entrusted with by Allah *subhanahu wa Ta'la,* the Creator and Master of the world.

---

[391] Al-Qura'n; al- Baqarah, 190-94.

[392] Allauddin Kasam: Badaius Sanaie 7/98.

"Allah give your grace! Why did you grant them permission until those who told the truth and you knew the liars? Those who believe in Allah and the Final Day will not ask you for exemption from fighting with their goods and persons; and Allah knows well those who fear him. Only those ask you for exemption who do not believe in Allah and the Final Day, and hose hearts are in doubt, so they are vacilating in their doubts. [393]

Sorts of the war of defence as reflected in the Qur'an and Sunnah

An investigative study of the war related verses of the Qur'an and the events of the Sirah of the Prophet of Allah suggests more causes.

Defending oneself against oppression and transgression

Defending oneself against the oppression and transgression constitutes a notable sort of the war of defence. the following verses, which according to earlier great exegetes Holy Quran, are the first ones to be revealed in connexion with the permission to fight for the self-defence.

أُذِنَ لِلَّذِينَ يُقَٰتَلُونَ بِأَنَّهُمْ ظُلِمُوا۟ ۚ وَإِنَّ ٱللَّهَ عَلَىٰ نَصْرِهِمْ
لَقَدِيرٌ ٣٩

To those against whom war is made, permission is given (to fight), because they have been wronged; and verily Allah is able to support them.

ٱلَّذِينَ أُخْرِجُوا۟ مِن دِيَٰرِهِم بِغَيْرِ حَقٍّ إِلَّآ أَن يَقُولُوا۟ رَبُّنَا ٱللَّهُ ۗ
وَلَوْلَا دَفْعُ ٱللَّهِ ٱلنَّاسَ بَعْضَهُم بِبَعْضٍ لَّهُدِّمَتْ صَوَٰمِعُ وَبِيَعٌ
وَصَلَوَٰتٌ وَمَسَٰجِدُ يُذْكَرُ فِيهَا ٱسْمُ ٱللَّهِ كَثِيرًا ۗ
وَلَيَنصُرَنَّ ٱللَّهُ مَن يَنصُرُهُۥٓ ۗ إِنَّ ٱللَّهَ لَقَوِىٌّ عَزِيزٌ ٤٠

---

[393] Al-Taubah: 4344,45.

Those who have been driven out of their homes in defiance of right, except that they say, "Our Lord is Allah".[394]

Other verses of the kind include the following:

وَقَٰتِلُواْ فِي سَبِيلِ ٱللَّهِ ٱلَّذِينَ يُقَٰتِلُونَكُمۡ وَلَا تَعۡتَدُوٓاْۚ إِنَّ ٱللَّهَ لَا
يُحِبُّ ٱلۡمُعۡتَدِينَ ﴿١٩٠﴾

Fight in the cause of Allah against those who fight you, but do not transgress the limits; for Allah loves not the transgressors.

وَٱقۡتُلُوهُمۡ حَيۡثُ ثَقِفۡتُمُوهُمۡ وَأَخۡرِجُوهُم مِّنۡ حَيۡثُ أَخۡرَجُوكُمۡۚ وَٱلۡفِتۡنَةُ أَشَدُّ مِنَ
ٱلۡقَتۡلِۚ وَلَا تُقَٰتِلُوهُمۡ عِندَ ٱلۡمَسۡجِدِ ٱلۡحَرَامِ حَتَّىٰ يُقَٰتِلُوكُمۡ فِيهِۖ فَإِن قَٰتَلُوكُمۡ
فَٱقۡتُلُوهُمۡۗ كَذَٰلِكَ جَزَآءُ ٱلۡكَٰفِرِينَ ﴿١٩١﴾

And slay them wherever you catch them, and drive them out from whether they have driven you out. And persecution is worse than slaying."[395]

From the Qur'anic verses cited above we may safely infer the following:

1. If the war is waged against the Muslims or they are subjected to oppressive tactics, they are permitted to fight the oppressors in their defence.
2. Muslims are commanded by Allah to fight against those people who drive the Muslims out of their homes, and divest them estates, or their properties and possession and deny their legitimate human rights.
3. If the Muslims are subjected to religious persecution merely because of that they are Muslims, of a firmer faith in the Lordship and godhead of Allah, they are permitted to fight against the persecutors so as to retains their religious freedom.
4. If the Muslims have been driven out from a piece of land of their, or a Muslim States sovereignty was terminated by the enemy, the Muslim

---

[394] Al-Qura'n 22:39-40.

[395] Al-Qura'n 2:190,191.

shall be required to exerts themselves to reclaim to lost piece of their land and drive the enemy out of all such pieces of land from where the Muslims were driven out.

5. It is lawful for the Muslims to indulge themselves within the limits of the law of Allah of special note in the verse (190) is the superlativeness of the ethics of war in Islam, which asks the defending Muslim army to always conduct itself in a law-abiding moral manner, committing no transgression even against those who have no preferred job but to subject the weaker Muslim sections of the society to untold hardships and newer oppressive tactics.

Removing obstacles against access to the path of Allah

The Bitterest fact that the world of disbelief will always remain intolerant and uncatholic to the freedom of religion as regard Muslim is best expressed by the following Qur'anic verse:

> And they will always remain fighting you so as to turn, highlights the most fundamental cause of war of defence which the Muslims are commanded to undertake, and whole the concept of war in Islam basically revolves round this. Islam's objective is indeed the highest and noblest, that is, conveying to mankind what is the most urgent need of it. That is Islam, the Final Message of Allah to mankind. The Muslims will resort of fighting only when they are denied their right to a peaceful propagation of Islam to the world at large. The Messenger of Islam has been raised by Allah to all mankind to be peace and mercy for all the words.

Taking stern punitive measures against treachery and breach of confidence

A yet another crime against the perpetrators of which the Muslims are ordained by Allah to wage war is the commission of treachery and the perfidious break of the treaty. To quote few Qur'anic verses here:

إِنَّ شَرَّ ٱلدَّوَآبِّ عِندَ ٱللَّهِ ٱلَّذِينَ كَفَرُوا۟ فَهُمْ لَا يُؤْمِنُونَ ﴿٥٥﴾
ٱلَّذِينَ عَٰهَدتَّ مِنْهُمْ ثُمَّ يَنقُضُونَ عَهْدَهُمْ فِى كُلِّ مَرَّةٍ وَهُمْ لَا
يَتَّقُونَ ﴿٥٦﴾

فَإِمَّا تَثۡقَفَنَّهُمۡ فِي ٱلۡحَرۡبِ فَشَرِّدۡ بِهِم مَّنۡ خَلۡفَهُمۡ لَعَلَّهُمۡ
يَذَّكَّرُونَ ﴿٥٧﴾

> The worst of beasts in the sight of Allah are those who reject Him: so they will not believe.
>
> Such are those with whom you did make a covenant, then they break their covenant every time, and they have not the fear (of Allah).
>
> If you catch them in war, disperse with them those who follow them. So that they may remember.
>
> If you fear a treachery from any group, throw back their covenant to them on equal terms. For Allah loves not the treacherous.[396]

The purpose of the verse 57 is to urge Muslims that they should act against their enemies of the type described above with a severity and resoluteness so as to serve as a deterrent to other forces hostile to Islam who might be inclined to follow the example of the treacherous while being at covenant with Muslim.

They has sold the words of Allah for a miserable price, and thus have debarred (many people) from the way of Allah: evil indeed are the deeds which they do.

In a believer they respect not the ties either of kinship or covenant and it is they who have transgressed all bounds.[397] The study of the above cited verse leads us to the following:

1. The Muslim State is entitled to wage war against those unbelievers who break their covenant with Muslims. This rule includes those unbelievers too who turn rebellious, having made a covenant of obedience towards the Islamic state.

> But (even so), if they repent, establish regular prayer, and pay Zakat, they are your brethren in Faith. (Thus) do we explain the Signs in detail, for those who understand.

---

[396] Al-Qura'n 8:55,56,57.

[397] S.9.V.7-10.

> But if they violate their oaths after their covenant, and attack your faith, Fight you the chiefs of Unfaith for their oaths are nothing on them that thus they may be restrained.
>
> Will you not fight people who violated their oaths plotted to expel the Messenger and attacked you first? Do you fear them? Nay is is Allah Whom you should more justly fear, if you believe!

2. As regards the unbelievers, who in spite of their peace treaty with Muslims, continue to be hostile towards Muslims so much as the Muslims have to live in constant fear from them, the Muslims should announce their withdrawal from the treaty, having communicated the same to the other party, and then a befitting reply should be dealt out to such hostile, hypocritical parties.
3. Those who repeatedly commit treachery, recklessly dishonour their promises and oaths and have no human consideration or moral sense in harming Islam and Muslims, the Islamic state shall be in a constant state of war with the peoples and nations of such a character. A truce with such people is possible only if they amend their conduct and enter into the fold of Islam. If they reject, it, the Islamic State shall have no option other than taking necessary measures to protect the *Darul Islam* against their all time threat from them. To get rid of such faithless people all the war tactics, besieging them putting them to sword and such like other deterrent and punitive action might be taken.

Getting rid of the internal enemies

Apart from the external enemies there might be internal ones who outwardly show their friendship towards Muslims, but inwardly harbour deeper grudges to them and leave no stone unturned in inflicting harms to the Muslims and the Islamic State. All such mischievous elements of the society have been termed by the Qur'an as hypocrites; the most suitable word to include all the people of such a devilish character. In the Qur'an we find the following instructions as to how to deal with them.

يَٰٓأَيُّهَا ٱلنَّبِيُّ جَٰهِدِ ٱلْكُفَّارَ وَٱلْمُنَٰفِقِينَ وَٱغْلُظْ عَلَيْهِمْۚ
وَمَأْوَىٰهُمْ جَهَنَّمُۖ وَبِئْسَ ٱلْمَصِيرُ ﴿٧٣﴾

> "O the Prophet! Strive hard against the Unbelievers and the Hypocrites, and treat them with harshness, their abode is Hell, an evil refuge indeed." [398]

۞ لَّئِن لَّمْ يَنتَهِ ٱلْمُنَٰفِقُونَ وَٱلَّذِينَ فِى قُلُوبِهِم مَّرَضٌ
وَٱلْمُرْجِفُونَ فِى ٱلْمَدِينَةِ لَنُغْرِيَنَّكَ بِهِمْ ثُمَّ لَا يُجَاوِرُونَكَ
فِيهَآ إِلَّا قَلِيلًا ﴿٦٠﴾
مَّلْعُونِينَ ۖ أَيْنَمَا ثُقِفُوٓا۟ أُخِذُوا۟ وَقُتِّلُوا۟ تَقْتِيلًا ﴿٦١﴾

> "If the Hypocrites and those in whose hearts is a disease, and those who stir up sedition in the City, desist not, We shall certainly stir up you against them. Then they will not be able to stay in it as your neighbors for any length of time. They shall have a curse on them: wherever they are found. they shall be seized and put to sword." [399]

They but wish that you should reject Faith, As they do. And thus be on the same footing (as they): so take not friends from their ranks until they migrate in the way of Allah. (From what is forbidden). But if they turn renegades seize them whenever you find them; and (in any case) take no friends or helpers from their ranks.

سَتَجِدُونَ ءَاخَرِينَ يُرِيدُونَ أَن يَأْمَنُوكُمْ وَيَأْمَنُوا۟ قَوْمَهُمْ كُلَّ مَا رُدُّوٓا۟
إِلَى ٱلْفِتْنَةِ أُرْكِسُوا۟ فِيهَا ۚ فَإِن لَّمْ يَعْتَزِلُوكُمْ وَيُلْقُوٓا۟ إِلَيْكُمُ ٱلسَّلَمَ وَيَكُفُّوٓا۟
أَيْدِيَهُمْ فَخُذُوهُمْ وَٱقْتُلُوهُمْ حَيْثُ ثَقِفْتُمُوهُمْ ۚ وَأُو۟لَٰٓئِكُمْ
جَعَلْنَا لَكُمْ عَلَيْهِمْ سُلْطَٰنًا مُّبِينًا ﴿٩١﴾

> Others you will find that wish to be secure from you as well as that of their people; whenever they are sent back to temptation, they

---

[398] Al-Qura'n 9:73.

[399] Al-Qura'n 33:60-61.

> sucumb thereto; if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands, seize them and slay them wherever you get them. In their case we have provided you with a clear argument against them.[400]

The above cited verses have clearly set out the catalogue of those crimes of the Hypocrites which the Holy Qur'an has held them the guilty of and announced the severest punishment for them. The following verses put forth more aspect of their evil character:

وَيَقُولُونَ طَاعَةٌ فَإِذَا بَرَزُوا مِنْ عِندِكَ بَيَّتَ طَآئِفَةٌ مِّنْهُمْ غَيْرَ
ٱلَّذِي تَقُولُ ۖ وَٱللَّهُ يَكْتُبُ مَا يُبَيِّتُونَ ۖ فَأَعْرِضْ عَنْهُمْ وَتَوَكَّلْ عَلَى ٱللَّهِ ۚ
وَكَفَىٰ بِٱللَّهِ وَكِيلًا ﴿٨١﴾

> They have "Obedience" On their lips; but when they leave thee, a section of them meditate all night on things very different from what you tell them and Allah records their nightly (plots): so keep clear of them and put your trust in Allah, and enough is Allah as a Disposer of Affairs." [401]
>
> If they had come out with you they would not have added to you (strength) but only disorder, hurrying to and fro in your midst and sowing sedition you, and there would have been some among you who would have listened to them but Allah knows well those who do wrong.1
>
> Indeed they had piloted sedition before, and upset matters for you, until the truth arrived, and the decree of Allah became manifest, much to their disgust.

---

[400] Al-Qura'n 4:91.

[401] Al-Qura'n 4:81.

لَوْ خَرَجُوا۟ فِيكُم مَّا زَادُوكُمْ إِلَّا خَبَالًا وَلَأَوْضَعُوا۟ خِلَٰلَكُمْ
يَبْغُونَكُمُ ٱلْفِتْنَةَ وَفِيكُمْ سَمَّٰعُونَ لَهُمْ ۗ وَٱللَّهُ عَلِيمٌۢ
بِٱلظَّٰلِمِينَ ﴿٤٧﴾
لَقَدِ ٱبْتَغَوُا۟ ٱلْفِتْنَةَ مِن قَبْلُ وَقَلَّبُوا۟ لَكَ ٱلْأُمُورَ حَتَّىٰ جَآءَ
ٱلْحَقُّ وَظَهَرَ أَمْرُ ٱللَّهِ وَهُمْ كَٰرِهُونَ ﴿٤٨﴾
وَيَحْلِفُونَ بِٱللَّهِ إِنَّهُمْ لَمِنكُمْ وَمَا هُم مِّنكُمْ وَلَٰكِنَّهُمْ قَوْمٌ
يَفْرَقُونَ ﴿٥٦﴾
لَوْ يَجِدُونَ مَلْجَـًٔا أَوْ مَغَٰرَٰتٍ أَوْ مُدَّخَلًا لَّوَلَّوْا۟ إِلَيْهِ وَهُمْ
يَجْمَحُونَ ﴿٥٧﴾

They swear by Allah that they are indeed of you: but they are not of you: yet they are afraid (of you).

If they could find a place to flee to, or caves, or a place of concealment, they would turn straightway thereto with an obstinate rush. [402]

On another place their hypocritical character has been exposed as:

وَإِذْ يَقُولُ ٱلْمُنَٰفِقُونَ وَٱلَّذِينَ فِى قُلُوبِهِم مَّرَضٌ مَّا وَعَدَنَا ٱللَّهُ وَرَسُولُهُۥٓ
إِلَّا غُرُورًا ﴿١٢﴾

And behold! The Hypocrites and those in whose hearts is a disease say: "Allah and his Messenger promised us nothing but delusions!"[403]

---

[402] Al-Qura'n 9 :47- 48 and 56-57.

[403] Al-Qura'n 33:12.

وَإِذْ قَالَت طَّآئِفَةٌ مِّنْهُمْ يَٰٓأَهْلَ يَثْرِبَ لَا مُقَامَ لَكُمْ فَٱرْجِعُوا۟ ۚ
وَيَسْتَـْٔذِنُ فَرِيقٌ مِّنْهُمُ ٱلنَّبِىَّ يَقُولُونَ إِنَّ بُيُوتَنَا عَوْرَةٌ وَمَا هِىَ بِعَوْرَةٍ ۖ إِن
يُرِيدُونَ إِلَّا فِرَارًا ﴿١٣﴾

> Behold! A party among them said: "You men of Yathrib! You cannot stand (the attack)! Therefore go back!" And a band of them ask for leave of the Prophet saying, "Truly our houses are bare and exposed, though they were not exposed; they intended nothing but to run away."[404]

And if an entry had been effected to them from the sides of the (City) and they had been incited to sedition, they would certainly have brought it to pass, with none but a brief delay!

وَإِذْ يَقُولُ ٱلْمُنَٰفِقُونَ وَٱلَّذِينَ فِى قُلُوبِهِم مَّرَضٌ مَّا وَعَدَنَا ٱللَّهُ وَرَسُولُهُۥٓ
إِلَّا غُرُورًا ﴿١٢﴾

وَإِذْ قَالَت طَّآئِفَةٌ مِّنْهُمْ يَٰٓأَهْلَ يَثْرِبَ لَا مُقَامَ لَكُمْ فَٱرْجِعُوا۟ ۚ
وَيَسْتَـْٔذِنُ فَرِيقٌ مِّنْهُمُ ٱلنَّبِىَّ يَقُولُونَ إِنَّ بُيُوتَنَا عَوْرَةٌ وَمَا هِىَ بِعَوْرَةٍ ۖ إِن
يُرِيدُونَ إِلَّا فِرَارًا ﴿١٣﴾

وَلَوْ دُخِلَتْ عَلَيْهِم مِّنْ أَقْطَارِهَا ثُمَّ سُئِلُوا۟ ٱلْفِتْنَةَ لَءَاتَوْهَا وَمَا تَلَبَّثُوا۟
بِهَآ إِلَّا يَسِيرًا ﴿١٤﴾

وَلَقَدْ كَانُوا۟ عَٰهَدُوا۟ ٱللَّهَ مِن قَبْلُ لَا يُوَلُّونَ ٱلْأَدْبَٰرَ ۚ وَكَانَ عَهْدُ ٱللَّهِ
مَسْـُٔولًا ﴿١٥﴾

---

[404] Al-Qura'n 33:13.

> And yet they had already covenated with Allah not to turn their backs, and a covenant with Allah must (surely) be answered for.[405]

هُوَ ٱلَّذِى جَعَلَ لَكُمُ ٱلَّيْلَ لِتَسْكُنُوا۟ فِيهِ وَٱلنَّهَارَ
مُبْصِرًا ۚ إِنَّ فِى ذَٰلِكَ لَءَايَٰتٍ لِّقَوْمٍ يَسْمَعُونَ ﴿٦٧﴾

> The Hypocrites, men and women, are alike: they enjoy evil, and forbid what is just, and tighten their purses' strings. They have forgotten Allah so He has forgotten them. Verily the Hypocrites are rebellious and perverse.[406]

In the chapter *al-Munafiqun* the character of the hypocrites is described as follows:

إِذَا جَآءَكَ ٱلْمُنَٰفِقُونَ قَالُوا۟ نَشْهَدُ إِنَّكَ لَرَسُولُ ٱللَّهِ ۗ وَٱللَّهُ يَعْلَمُ إِنَّكَ
لَرَسُولُهُۥ وَٱللَّهُ يَشْهَدُ إِنَّ ٱلْمُنَٰفِقِينَ لَكَٰذِبُونَ ﴿١﴾
ٱتَّخَذُوٓا۟ أَيْمَٰنَهُمْ جُنَّةً فَصَدُّوا۟ عَن سَبِيلِ ٱللَّهِ ۚ إِنَّهُمْ سَآءَ مَا كَانُوا۟
يَعْمَلُونَ ﴿٢﴾

> "When the Hypocrites come to you, they say, "We bear witness that you are indeed the Messenger of Allah." And Allah knows that you are His Messenger, and Allah bears witness that the Hypocrites are indeed liars. They have made their oaths a screen for their misdeeds. Thus they obstruct (The people) from the path of Allah. Truly evil is what they are doing." [407]

All such verses, and many others, seek to tell the Holy prophet and the Muslims that there exists a group of the Hypocrites which deserves not to be dealt with leniency even outwardly. Their general character is that they openly talk of disbelief and blasphemy, in spite of their repeated claims of Islam. They hardly miss a chance to harm Muslims and always act against the interests of the Islamic State. Against such people Allah *subhanahu wa Ta'ala* has directed His Prophet to take stern punitive steps. For the people of such a hypocritical character pose an internal menace, and or far more devastating to Islam than those forces openly hostile to it.

---

[405] Al-Qura'n 33: 12, 13, 14, 15.

[406] Al-Qura'n 10 : 67

[407] Al-Qura'n 63:1-2.

Maintaining internal peace and security

The Islamic state is most cases, may have a yet another sort of terrible enemies who, being inside or outside the Islamic state, commit sorts of mischief disrupt law and order of the land by perpetrating the heinous crimes of indiscriminate murder and pillage, commit the acts of rebellion and do whatever is at their disposal to destabilize even overthrow the Islamic state. About the enemies of such character the Holy Qur'an has directed the Islamic state to use its security forcing and the required military might against this internal menace.

Maintenance of internal peace and security constitutes a highly significant part of the Islamic State towards its people. For the Muslims, the chief constituent of the state's population can never live in peace and shall not be able to discharge their most sacred religious duty of communicating the Divine message to mankind at large unless pace prevails the land. The prophet himself had to face challenges to the security of Islamic state under him command and the circumstances forced him to take the severest punitive steps against the enemies of the sort. The *ahadith* corpus furnishes more than one examples in this regard. To put here a single example.

"Anas b. Malik reports that some people of the Uraina clan approached the Holy Prophet (SAWS) embraced Islam and started living in Madina. But due to the Changed climatic situation of Madina they soon fell ill. According to another version of the narration, they turned pale and suffered fro flatuance. On their request the Prophet allowed them to stay in the grazing ground for the Prophet's camels outside Madina suggesting them to live by their milk and drink the camel urine as medicine so as to regain their health. Having followed the Prophet]'s advice their health improved. Much to the shock of the Prophet and the Muslims, they committed the worst kind of the of treachery and ingratitude towards the sapling of the Islamic state. They turned apostate, put the prophet's shepherd to sword and drove away the hard of camels with them.

Learnt this unfortunate happening, the Holy Prophet sent a contingent to chase them which was able to catch them. In view of their terrible crimes, the Prophet decided to administer an exemplary punishment to them. He got their hands and feet cut took out their eyes and then left them under sun to die agonizingly.

The reason for blinding them by taking their eyes out and cutting off their hands and feet was that they too had slain the Prophet's shepherd in the same manner, as Imam Muslim b. al Hajjaj has recorded in his celebrated book from Anas. So, the guilty were meted out the similar punishment. Also the stern step was prudent one so as to strike terror in the hearts of the mischief-makers, and if the enemies are caught alive, administer to them the severest punishments as mentioned in the following Qur'anic Verse:

It is Allah's purpose, and it is for this very purpose that He sent His Messengers, that a righteous order of life be established on earth; an order that would provide peace and security to everything found on earth, an order under whose benign shadow humanity would be able to attain its perfection; an order under which mankind would be able to live its trial sojourn in peace an order under which the resources of the earth would be exploited in a manner conducive to man's progress and prosperity rather than to his ruin and destruction. If anyone tried to disrupt such an order, whether on a limited scale by committing murder, destruction, robbery and brigandry or on a large scale by attempting to overthrow that order to established some unrighteous order instead, he would in fact be guilty of waging war against Allah and His Messenger. All this is not unlike the situation where someone tries to overthrow the established government in a country. Such a person will be convicted of waging war against the state even though his actual action may have been directed against an ordinary policeman in some remote part of the country, and irrespective of how remote the sovereign himself is from him.

The penalties mentioned here in brief merely are to serve as guidelines to either judges or rulers so they may punish each criminal in accordance with the nature of his crime. The real purpose is indicate that for any of those who live in the Islamic realm making an attempt to overthrow the Islamic order is the worst kind of crime, for which any of the highly sever punishments may be imposed.

However, if they give up subversion and abandon their endeavour to disrupt or overthrow the righteous order, and their subsequent conduct shows that they have indeed become peace loving, law-abiding citizens of good character, they need not be subject to the punishments mentioned here even if any of their former crimes against the state should come to light. if their crime involves violation of the rights of other men, they many not be absolved from their guilt. If, for instance, they have either killed a person, seized someone's property or committed any other crime against human life or property they will be tried according to the criminal law of Islam. They will not, however, be accused of either rebellion and high treason or of waging war against Allah and His Messenger.

Supporting the wronged Muslims

A yet another situation in which the Islamic state is permitted to take up arms is lending support to the wronged Muslims. To explain the point, if a group of Muslims is being subjected to persecution and inhuman treatment and it happens too weak and resourceless to defend itself by its own, the sovereign, powerful Muslim state falls under obligation to raise arms so as to rid the wronged and oppressed Muslims from the tyrannical grasp. In this regard the following Qur'anic verse has directed the Holy Prophet (SAWS) and the Muslims as follows:

وَمَا لَكُمۡ لَا تُقَٰتِلُونَ فِى سَبِيلِ ٱللَّهِ وَٱلۡمُسۡتَضۡعَفِينَ مِنَ ٱلرِّجَالِ وَٱلنِّسَآءِ
وَٱلۡوِلۡدَٰنِ ٱلَّذِينَ يَقُولُونَ رَبَّنَآ أَخۡرِجۡنَا مِنۡ هَٰذِهِ ٱلۡقَرۡيَةِ ٱلظَّالِمِ أَهۡلُهَا
وَٱجۡعَل لَّنَا مِن لَّدُنكَ وَلِيّٗا وَٱجۡعَل لَّنَا مِن لَّدُنكَ نَصِيرًا ٧٥

> And why should you not fight in the cause of Allah and of those who, being weak' are ill-treated (and oppressed)? men, women, and children, and children, whose cry is: Our Lord! Rescue you us from this town, whose people are oppressors: and raise for us from one who will protect; and raise for us from you one who will help. [408]

The following verse puts the significance of this support in even more vivid words:

---

[408] Al-Qura'n 4:75.

إِنَّ ٱلَّذِينَ ءَامَنُواْ وَهَاجَرُواْ وَجَٰهَدُواْ بِأَمۡوَٰلِهِمۡ وَأَنفُسِهِمۡ فِي
سَبِيلِ ٱللَّهِ وَٱلَّذِينَ ءَاوَواْ وَّنَصَرُوٓاْ أُوْلَٰٓئِكَ بَعۡضُهُمۡ أَوۡلِيَآءُ بَعۡضٖۚ وَٱلَّذِينَ
ءَامَنُواْ وَلَمۡ يُهَاجِرُواْ مَا لَكُم مِّن وَلَٰيَتِهِم مِّن شَيۡءٍ حَتَّىٰ يُهَاجِرُواْۚ وَإِنِ
ٱسۡتَنصَرُوكُمۡ فِي ٱلدِّينِ فَعَلَيۡكُمُ ٱلنَّصۡرُ إِلَّا عَلَىٰ قَوۡمِۭ بَيۡنَكُمۡ
وَبَيۡنَهُم مِّيثَٰقٞۗ وَٱللَّهُ بِمَا تَعۡمَلُونَ بَصِيرٞ ٧٢
وَٱلَّذِينَ كَفَرُواْ بَعۡضُهُمۡ أَوۡلِيَآءُ بَعۡضٍۚ إِلَّا تَفۡعَلُوهُ تَكُن فِتۡنَةٞ فِي
ٱلۡأَرۡضِ وَفَسَادٞ كَبِيرٞ ٧٣

> As to those who believed but did not emigrate, you have no right to establish friendship with them until they emigrate, but if they seek your support in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance. And Allah sees whatever you do.
>
> The unbelievers are friends of one another: if you do it not, (protect each other), there would be tumult and persecution on earth and great mischief.[409]

This verse is an important one from among those which expound the law of relationship between the Muslims of the sovereign Islamic State and those of the un-Islamic state. The laws expressed in the verse set out below:

(a) No social or cultural relationship could be established between the Muslims of the Islamic state and the Muslims who live or have to live under an un-Islamic state.

(b) In spite of this law, they are Muslims, and if they call the Islamic state for their help against their governments which are subjecting those Muslims to religious persecution, the Islamic State is obliged to come to the rescue of the oppressed Muslims.

---

[409] Al-Qura'n 8: 72-73.

(c) The Muslim State is not permitted to lend support to the oppressed Muslims if the Islamic state has a treaty with the un-Islamic state, for sticking to there terms of the treaty is far more important than coming to the rescue of the oppressed Muslims. The oppressed Muslims could be supported only after the termination of the stipulated term of treaty.

(d) Religious persecution and violation of the fundamental human rights constitutes the worst of wrong towards human beings. Being Islam's cause the cause of indiscriminate justice and the cause of the oppressed, Allah has commanded the Islamic sovereign state to offer its maximum support to the oppressed apart from what religion e professes or what racial stock he comes from.

(e) The war ethics of the Holy Prophet holds it highly important duty to fulfil the mutual covenants and treaties. The Qur'an and the Sunnah have laid special emphasis on it and count it from among the noble and rare qualities of the Believers. Violation of the terms of treaties and the breach of faith are declared to be an act of hypocrisy. A Mutual treaty could not be violated in any case. Even the Muslims are not allowed to lend political or military assistances against an oppressive state with which the Islamic State is in terms of a treaty.

Maintaining internal peace and security

A deeper look at the concept of the defensive war, as set out above, will reveal that the underlying purpose of it is nothing but to teach the Muslim Ummah that it must not let the evil and mischief gain hold over Islam and the Muslim community's religious existence. The Islamic teachings ask the Muslims to be always ready to crush the evil and mischief, apart from it surfaces itself from within or hits the Muslims from outside. The sacred obligation which the Muslims have to fulfil and the foremost important they have to paly towards the true betterment and ultimate success of mankind essentially requires that they must posses a strong national and political position in the comity of the nations of the world. For this they are in constant need to preserve themselves and their military strength against all internal and external mischievous designs of the diabolical forces. In case the Muslims themselves are not secure, and their peace and security lies in constant threats from internal and external evil elements never they can fulfil their religious duty of calling all mankind to Islam, the religion of Truth Thus their weakness is not just theirs own, it would indeed put the destiny of all mankind to peril. The Qur'an has therefore communicated to the Prophet and the Muslims the important features of those mischievous elements out of the human beings who may cause the destruction of Muslims and shatter their political and military power simultaneously commanding the Muslims are not commended to raise arms and unleash their swords only when the evil surfaces and spreads itself, they instead have been ordered to always maintain a sufficient deterrent against them so as to strike terror into the hearts of such obscurantist, retrogressive element out of the human race.

As regards the maintaining of the strong credible deterrence, the following Qur'anic verse is decisive:

وَأَعِدُّوا۟ لَهُم مَّا ٱسْتَطَعْتُم مِّن قُوَّةٍ وَمِن رِّبَاطِ ٱلْخَيْلِ
تُرْهِبُونَ بِهِۦ عَدُوَّ ٱللَّهِ وَعَدُوَّكُمْ وَءَاخَرِينَ مِن دُونِهِمْ لَا
تَعْلَمُونَهُمُ ٱللَّهُ يَعْلَمُهُمْ ۚ وَمَا تُنفِقُوا۟ مِن شَىْءٍ فِى سَبِيلِ ٱللَّهِ يُوَفَّ
إِلَيْكُمْ وَأَنتُمْ لَا تُظْلَمُونَ ﴿٦٠﴾

> Against them made ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies of Allah and your enemies and other besides, whom you may not know. And whatever you spend in the cause of Allah, shall be repaid unto you and you shall not be wronged." [410]

According to the Islamic concept of war, all the wars and of the Holy Prophet (SAWS) were meant to repulse the evil of the enemies of war that the military operation and the use of force against the enemy must remain restricted to the repulsion of the evil, strictly limited to those people who are belligerents and form a menace to Islam and Muslims. All other human classes, and the belongings of the enemy, which have nothing to do with the war, must be saved from the scourge of war. This concept is entirely different from all the concepts attached to war in the world contemporary to the Holy Prophet and with which the non-Muslim minds have often been occupied even since the inception of the history of war.

As its first step towards cleansing the general mindset of the older destructive concepts or war, the Qur'an and Sunnah renounced all the existing words and expressions of war and replaced it by the *Jihad fi sabilillah*, a beautiful expression which comprehensively covers all the aspect of its subject and simultaneously draws a line of distinction between the war of Islam and that of the non-Muslim world. The word Jihad is derived from *jahd* meaning to strive. But in the jridico-religious sense, jihad signifies exertion of one's power to the utmost of one's capacity for the cause of Allah. The expression of *fi sabilillah* restricts the meaning of jihad (stiving) to that the sole motivating intent of the jihad must be the service of the cause of Allah. If this striving has an aim an aim and objective then the cause of Allah, it has no value in the eye of Allah and therefore shall carry no rewards.

---

[410] Al-Qura'n 8: 60.

Under this high and noble concept of war, the Prophet of Islam, under the direct guidance from Allah, the Creator or mankind and the only well-Aware of the secrets of Nature, introduced complete and perfect war ethics which include the war etiquette, its moral limits, rights and obligations of the belligerents, drew a clear line or demarcation between the combatants and non-combatants and explained the rights of both the classes of people. The Islamic war ethics gives an elaborated statement of the rights and obligations of the *muahidin,* of the envoys and the representatives of the belligerent or neutral states, those of the war captives and of the conquered nations. For all the above mentioned things, the Law Allah laid down well-defined principles of law and set necessary details as and when required. More importantly, the ethical principles of war in Islam are rooted deep in the unshakable religious foundations and not mere statements of some God-disoriented philosophers and the men of law, as is the case of the modern Godless west. Ever since their introduction, the Islamic ethical principle of war have been in practice the Holy Prophet, in all his military operations, and his Four-Rightly Guided caliphs followed them and conquered a much larger part of the populated earth without violating a bit of their religious war ethics. What follows is a statement of the war ethics as reflected in the wars of the holy Prophet of Allah.

Clear definition of the objectives and causes of war

Undeniably, there exists a close affinity between the act and its motivating intent; indeed it the intent which orientates the act Although it was extremely difficult to detach the people from their ages-old familiar intents and causes of war and fighting, still the Holy Prophet (SAWS) did the same first, thereby to achieve the actual goals of war and fighting. For the non-Muslim mindset it was quite unimaginable to think that there might be a cause of fighting and laying down one's life other than securing the heaps of wealth of other people, quenching the thirst of territorial aggrandizement, seeking of fame or satisfaction of prejudices. They were quite unable to conceive of a war to be fought without ulterior motives and to meet a demand other than the satisfaction of one's sensual desires. So, to begin with, the holy Prophet (SAWS) washed the brain of Muslims of the worldly motive of war and clearly explained the meaning and purpose of the *jihad fi sabilillah* in a way which perfectly distinguished it from *the qital fi sabilittaghuth*. It seems in order to put her some important *ahadith* of the Holy Prophet which seek to lay special emphasis on the rectification of the intent and objective of war and fighting:

1. Abu Musa Ashari (may Allah be pleased with him) reports that a man came tot he Prophet and said:"A man fights for the war gains another fights for fame, and a yet another fights for showing off; which one of them fights is Allah's cause?" "He who fights for the elevation of the word of Allah fights for the cause of Allah," replied the Holy Prophet (SAWS).
2. Abu Musa Ashari reports that a person came to the Holy Prophet and asked him which fighting would be counted for the cause of Allah. For one of us fights to satisfy his anger and another fights for his national prejudice. Upon this the Holy Prophet, raising his head to the asking person, said: "Fighting for the cause of Allah is only of the person's who fought in order to elevate the word of Allah,"
3. Abu Umama Bahli reports that once a person came to the Holy Prophet (SAWS) and asked him: "What about the man who fights for the sake of reward and fame? What will fall to his lot?" He will gain nothing," replied the holy Prophet (SAWS). Since the holy Prophet's reply was quite unexpected for the asking person, he repeated his question three times consecutively and got the same reply fro the Holy Prophet (SAWS). Unsatisfied, he put the same question before the Prophet fourth time. The Prophet, then, explained the basic reason for him, saying: "Allah does not accept an action unless it is only for His sake, doe to seek only His pleasure.
4. Ubada bin Samit reported that the Messenger of Allah once said: "He who fought in the way of Allah and intended to achieve nothing but a rope, he shall get nothing but the same thing.
5. Muaz bin Jabal has reported the holy Prophet (SAWS) as saying: "Fighting is of two kinds: As regards the man who fights to seek the pleasure of Allah, obeyed the commander, spent his best wealth and kept himself away from mischief-making, suhc

6. Abu Hurairah (may Allah be pleased with him states that once the holy Prophet (SAWS) said:

"The man to be called first of all for reckoning on the Day of Resurrection shall be one who had suffered martyrdom. Allah ta'ala will let him recognize Alalh's favours on him. Then will say to him" How did you make use of My favours?" He will answer: "I fought for you and suffered martyrdom." Alalh ta'ala will say to him again: "You are telling a lie; you participated in fighting to make show of you vigor and bravery, and so has already happened, then he shall be condemned to Hell headlong. (Miskhat)

7. Abdullah b. Masud (may Allah be pleased him) reported to Holy Prophet (SAWS) to have said:

> "On the Day of Judgment a man shall approach Allah ta'ala, holding the hand of a man and say: "O Lord! He killed me." Allah ta'ala will ask the killer why did he kill him. The killer shall reply, "I killed him so as the honour be exclusive for you." Allah ta'ala will say: "It is for Me alone." Then another man will approach Allah ta'ala holding the hand of the man and make the same complaint about him. Allah will ask him why he killed that man. He will reply: "I killed him so as to make honour exclusive for the person so and so." Allah ta'ala will say, "The honour was not the right of that person." And then the killer shall be held for his sin of killing."

Such noble teachings of the holy Prophet (SAWS) purged the motives of war and fighting of all worldly purposes, the sayings of the Prophet were not the words of an ordinary man; in fact they where the words of the Messenger of Allah, whose spoken words were meant to shape the religious policy of the Muslims.

To the outlook of Islam towards war, no worldly motive pursing fame, seeking honour and political ascendancy, desire revenge of personal and national enmities offer no legitimate justification for taking up arm against a group of human beings. Islam in the *seerah* of the Prophet (SAWS) purged of all the worldly motives and base targets, the war is reduced to mere a tasteless moral and religious obligations, an act involving extreme dangers and put the life in jeopardy. Such an act of high risk could never be desired for by a man of sanity unless on is forced to d being a victims of mischief against one, is left with no option other than resorting to fight. The Prophet himself has exhorted the Muslims as follows:

"Don't desire for facing the enemy and ask Allah for peace. But if you are left with no options other than facing the enemy, than fight vigorously and carry it through. And know it that Paradise lies under the shades of sword."[411]

Purging the ways of war of un-Islamic and inhuman practices

In addition to determining the definite religious cause and purpose of war, the Prophet of Islam took initiatives to effect substantial reforms to the ways of fighting as the people indulged in savage and inhuman acts freely against their enemy during and after the cause of actual war.

In order to give a systematic presentation to the holy Prophet's of war ethics, it seems better to put them under two separate headings: prohibitive injunctions , and the imperative instructions. Both are to be followed by the Muslims military forces, and the violation of which will constitute a great disobedience to Allah and His Messenger.

Unambiguous distinction between the combatants and the non-combatants

From among the Prophet's war ethics the first important point is that the belligerents, who actually take part in the actual battle, and the non-combatants, who do not or cannot take part in actual fighting, or those who are incapacitated to participate in fighting. For example, women children, the aged, the infirm, the blind, the imbeciles, the travelers and those devoted to monastic services. The clear teachings of the holy Prophet (SAWS) forbid the Muslim fighter to kill anyone out of this category.

The following instructions of the holy Prophet (SAWS) lay down a well defined law in this regard:

> "Neither kill the old, verging on death, nor children and babes nor women. Do not steal anything from the booty and collect together all those things, which fall to your lot in the battle field and do good. For Allah loves those who act righteously." (Abu Dawud: the book of Jihad) "Narrated Abdullah bin Umar that once the Prophet (SAWS) saw the corpse of a woman who was killed in the battle. He

---

[411] Bukhari, Book of Jihad.

> admonished his men and warned them against killing women and children."[412]
>
> "It is also reported that the Prophet (SAWS) once happened to see the people gathered round something. He sent one of his companions to find out what the matter was. The companions in formed the him that a women lied slain and the people gathered found her body. The news shocked the Holy Prophet (SAWS) in the extreme and he expressed his grief in these words: "The woman did not take part in fighting, then why war she made a victim of your sword?" the people replied, "The army was under the command of Khalid b. Walid" He was summoned immediately, and the Prophet (SAWS) instructed him never to lay hands on woman or salves. He also issued a grim warning to Muslims against killing their enemies by way of burning."[413]
>
> On the occasion of the conquest of Makkah the holy Prophet (SAWS) issued strict instructions as: "Attack not an injured, nor chase the fleeing persons and declare peace for those who shut up their doors." [414]

Abdullah b. Abbas has reported that while dispatching and army to anywhere, the holy prophet (SAWS) would instruct the army men not to lay hands on harmless servants and the ascetics devoted to monastic services.

Disabled are not subject to killing

By the simple deduction from the above cited *ahadith* of the holy Prophet (SAWS), the Islamic jurisprudence has a general rule that all the disabled of those who normally o not take part in actual fighting, shall not absolute in its application. If, unfortunately, a disabled is seen involved in the ac of fighting by giving the army logistical of tactical information, or a woman or child is found involved in spying or a person attached to religious services is infusing the spirit of war into the fighting army, the killing of such persons is quite permissible, for, by involving himself/herself in the act of fighting or supporting his fighting army, he/she has deprived himself/herself from the rights exclusive for the no commandants. The general Islamic rule in this regard could be summed up as: all men from the combatant category could be subjected to killing apart from that he is actually fighting or not. And, on the other hand, no person out of the non-combatant category could be killed except in the case that those persons are found taking part in fighting or supporting his/her fighting army by any way.[415]

---

[412] Abu Dawud, the Book of jihad.

[413] Abu Dawud, the Book of Jihad.

[414] Futuhul Buldan P.47.

---

[415] Hidayah, chap. Kaifiatul Qital, Fathul Qadir vol.4 P.290-92, Badaeus Sanaie vol.17 P.101.

CHAPTER 22

Rights of the Combatants and how to treat them during and after war

After a brief statement of the rights of the non-combatants, now is the turn of the rights of the combatants. As far as the position of the Islamic law towards the combatants is concerned, it has admitted their natural and human rights fully, and has restricted its right to raising arms against the enemy of Truth and aggressor to certain well-defined limits. And it is binding upon the Muslim army to strictly keep all its military operations under these limits set by Allah and His Messenger. The important ones are as follows:

Prohibition of taking the enemy by surprise

Among the pagan Arabs and non-Arabs it was a general practice to take the enemy by surprise. They would attack their enemy towards the last part of night when the people would be in deep slumber. The Holy Prophet (SAWS) put an end to this obnoxious practice and laid down the rule not to attack the enemy during the right hour before the dawn of the day. Making mentions of the Khaibar expedition, Ansas b. Malik says:

> "If the holy Prophet ever approached an enemy during night hours, he never launched and offensive against them unless the day break."

There are two types of enemies which the Islamic state may have to face: external and internal. In the case of the external enemy, the Islamic State shall have to deal with him according to its international law. By internal enemies are meant those miscreant, anti social element who do mischief on the earth, endanger the lives and properties of the peaceful citizens of the Islamic State shall follow the directions given by Allah in the chapter of al-Maidah verse No. 33.

Prohibitions of killing the enemy by fire

It constituted a favorite part of the Arabs as well as non-Arabs to kill the captured enemy by burning him alive, thereby to quench their for revenge. The

Prophet of Mercy declared this savage act outlawed. to quote his words of prohibition:

> "Hamza al –Aslami, from his father, reported that the holy Prophet (SAWS) sent a military expedition under his command. The Prophet said to him : If you find a person so and so put him to fire." So I left for the destination. The Prophet (SAWS) called me back, and when I was back to him, he said to me: "I had ordered you to kill the person so. But now if you found him and do not burn him, for it behaves nobody to torment any body by fire but the Lord of the fire." [416]
>
> Another hadith, with the same prohibition, is reported by Abu Hurairah (may Allah be pleased with him).[417]

During the days of his caliphate, the caliph Ali b. abut Talib put some ardent heretics to fire. Abdullah bin Abbas (may Allah be pleased him) tried to refrain him from so doing refeing his admonition to the Prophetic direction. "Don't torment anybody with the torment of Allah."

There are many *ahadith* in this regard. And it is indeed a highly valuable point of the Prophet's war this that he put an end to this savage practice.

Prohibition of killing the enemy by fettering him

Like many more other savage practices in vogue during the days of Ignorance, a common made of killing the captured enemy was to kill him by fettering his hands and feet and torment him to death. This practice was in total opposition to the benevolent spirit of the Prophet of Islam, and he declared it outlawed. Ubaid bin Yala states that: "We took part in a military expedition under the command of Abdur Rahman b. Khalid. In the course of the expedition four stalwarts, out of the hostile forces, were brought to him. The commander got them killed by tying their hands and feet. The event was reported to Abu Ayub Ansari (may Allah be pleased with him), a noted companion of the holy Prophet (SAWS) shocked by this horrendous made of killing, the companion expressed his disgust at the event as: "I have heard the Prophet (SAWS) prohibiting the killing of men by typing them. By the Being in Whose hand lies my life, I would not have liked to kill in the manner even a hen." When this observation was communicated to the commander of the expedition, Abdur Rahman b. Khalid, he immediately set four slaves free, (thereby to expiate his sin)."[418]

---

[416] Abu Dawud, the Book of Jihad.

[417] Abu Dawud Book: Jihad.

Prohibition of plundering

If the commander of the Muslim army has concluded a peace treaty with the enemy, it turns completely outlawed for the Muslim army to commit the acts of plunder and destruction in the possessions and properties of the enemy. Any act of the kind shall be a sort of mischief-making in the land, an act entirely inconsistent with to the teachings of Islam.

To quote the words of the Holy Qur'an:

وَلَا تُفْسِدُوا۟ فِى ٱلْأَرْضِ بَعْدَ إِصْلَـٰحِهَا وَٱدْعُوهُ خَوْفًا وَطَمَعًا ۚ إِنَّ
رَحْمَتَ ٱللَّهِ قَرِيبٌ مِّنَ ٱلْمُحْسِنِينَ ﴿٥٦﴾
وَٱلْبَلَدُ ٱلطَّيِّبُ يَخْرُجُ نَبَاتُهُۥ بِإِذْنِ رَبِّهِۦ ۖ وَٱلَّذِى خَبُثَ لَا يَخْرُجُ إِلَّا
نَكِدًا ۚ كَذَٰلِكَ نُصَرِّفُ ٱلْـَٔايَـٰتِ لِقَوْمٍ يَشْكُرُونَ ﴿٥٨﴾

> "And do no make mischief one the earth after it has been set in order.[419]

Since the Islamic scheme of thing has no place for mischief making, the holy Prophet of Islam has issued clear prohibitive injunction against all such activities which involve mischief making. From among his several injunctions of the kind we would like to cite here only one. In the aftermath of the conquest of khaibar, when both the Jews and Muslims reached an agreement, some Muslim troops lost self control and abandoned themselves to plundering and pillaging. The enormity of the situation made Jews report the matter to the holy Prophet. The Jewish leader approached him, and addressing him rather harshly, said to him: "O Muhammad does it behoove you to kill our asses, eat our fruits and beat our women without a legitimate right." The complaint shocked the Prophet (SAWS) in the extreme, and he asked Ibne Auf to call out the people for *salat*. Then the stood up and addressed the gathering as follows:

---

[418] Abu Dawud, Book of Jihad.

[419] Al-Qura'n 7: 56, 58.

> "Does one of you, sitting in is couch, thinks that Allah has outlawed nothing except those mentioned in the Qur'an?

By Allah, whatever I admonish you or give you imperative and prohibitive injunctions are as much important and obligatory as those of the Qur'an itself. Know that Allah Ta'ala has not made it lawful to you to force into the houses of the people of the Book but with their permission, nor to beat their women, nor to eat their fruits if they have paid you whatever they owed."

Once, while on a military expedition some Muslim troops looted some goats to eat. Learnt this, the Holy Prophet (SAWS) upset the cooking pots from the stoves saying: spoils are no better than the carrion."

Abdullah b. Yazid reports that the Holy Prophet (SAWS) held the spoils unlawful. He says: the Holy Prophet (SAWS) prohibits (the Muslims) from using the goods taken away by force from the people and from mutilation."

This rule is so strict that Muslim troops are not permitted even to milk the animals without due permission from their owners.

Important note

There is a sharp distinction between the nuhba (the sopils) and the *ghaninat* (goods taken away by the winning Muslim army from the vanquished enemy). While the former is an act of mischief making in the earth and hence strictly outlawed by the Law of Islam, the latter one is quite lawful to collect and use, as the Holy Qur'an has stated in the following words:

فَكُلُوا۟ مِمَّا غَنِمْتُمْ حَلَٰلًا طَيِّبًا ۚ وَٱتَّقُوا۟ ٱللَّهَ ۚ إِنَّ ٱللَّهَ غَفُورٌ
رَّحِيمٌ ٦٩

> "So eat whatever you have obtained for it is lawful and clean and fear Allah. Surely Allah is ever forgiving. Most Merciful."[420]

In the terminology of the Islamic shariat the *nuhba* denoted the goods taken away by force from the domain of the enemy while marching into it. Also, the term is equally applied to the goods of the *ghanimat* kept secretly by a soldier before if systematic distribution among the army me.

Ironically, most orient lists and the western writers on Islam, prejudiced against Islam and its prophet (SAWS) as they are, not just make no distinction between the two well defined types of goods, but also conceal it the fact purely out of intention, with a clear intention to vilify religion of Islam, its prophet (SAWS) and its noble teachings. In the last chapter of the present monograph we shall *Insha Allah* discuss the topic in rather a detailed manner, and dispel the doubts and misapprehensions sown by the so-called ojective writers of the West.

---

[420] Al-Qura'n 8:69.

Prohibition of wanton destruction

While marching into the territory of the enemy it has been a generally favorite practice of the advancing among to abandon itself to wanton destruction- destroying the crops, squandering the fields, subjecting the general population to indiscriminate the fields, subjecting the general population to indiscriminate killing, setting every thing on fire. But all such acts are distasteful to Islam and the Qur'an describes them as the acts of mischief making in the eland. To quote the Qur'an.

وَإِذَا تَوَلَّىٰ سَعَىٰ فِي ٱلۡأَرۡضِ لِيُفۡسِدَ فِيهَا وَيُهۡلِكَ ٱلۡحَرۡثَ
وَٱلنَّسۡلَۚ وَٱللَّهُ لَا يُحِبُّ ٱلۡفَسَادَ ٢٠٥

> "And when he attains authority/and when he turns back, he goes about the earth spreading mischief and laying to waste crops and human life, while Allah loves not mischief."[421]

Wanton destruction is entirely opposed to Islam's fundamental concept of peace and security. While dispatching military expeditions to Syria, Iraq or elsewhere, Abu Bakr al-Siddique, the first caliph out of the four rightly guided caliphs, would the army some important directions. From among those ones the commmer were: Never destroy the in habitations and never lay waste to crops and fruity trees."

Important Note

Wanton destruction is totally opposed to a needful destruction. While the former is absolutely forbidden by Islam and never the holy Prophet (SAWS) indulged himself in it the latter type of destruction might be permissible if he strategical situation so require.

A very conspicuous example of the latter kind of destruction who do find the sirah of the holy prophet of Allah. In the course of the military operation against the Jewish clan, Bani Nazir the companions of the holy prophet (SAWS) have resort to cut down some palm trees. As a matter of rule, under unavoidable circumstances the trees, crops, buildings, inhabitations may be removed for leveling the way for the advance of the army. But under no condition the wanton destruction is permissible.[422]

---

[421] Al-Qura'n 2:205.

Ignoring intentionally the operational requirements of the holy Prophet's military against Bani Nazir, many Western unscrupulous writer have accused the Prophet (SAWS) of resorting to wanton destruction during the course of war.

We, *insha Allah*, will discuss this point and analyze this orientatlistic objection in detail in the separate chapter. But it has to be noted that such an unavoidable destruction is quite permissible. The contemporary international law has gone even farther. It permits the bombardment of the inhabitations, buildings, setting the trees on fire merely to render the besieged enemy unable to take shelter under them.[423]

Prohibition of mutilating the slain enemy

From Among the savage practices of the days of Ignorance the mutilation of the slain enemy was the most repugnant one. Mutilation of the slain enemy is the worst kind of desecrations of a human corpse. Apart from the nature of the guilt of the slain, his dead body deserves to be disposed of in an acceptable manner. In the moral structure of Islam's military law there is no room for such a savage and inhuman act. The Muslim martyrs' corpse too were subjected to the worst kind of mutilation many times. During the Uhud war, for instance, the corpse of Hamza b. Abdul Muttalib was mutilated by Hinda, the wife of Abu Sufiyan, then an was meted out to many other corposes.

The Prophet of Islam, who in fact is the messenger of mercy and peace, declared the practice of mutilation to be outlawed. To quote the hadith.

Samra b. Jundub reported that the holy Prophet (SAWS) would incite us giving away the charity and prohibit us from mutilation." (Abu Dawud, Book of Jihad)

---

[422] *Al jihad fil Islam* p. 228.

[423] Lawrence, Principles of International Law, p. 411.

Prohibition of killing the captives

From among the problems resulting form the war between two nations is that of the war captives. During the days of Ignorance before Islam the war captives were perhaps the most unfortunate persons and were subjected to the most inhuman treatment from undue humiliation, disgraceful killing, enslavement, object of sale and purchase and often sacrificed to the gods and goddesses of the captors. [424]

Almost the same treatment was meted out to the war captives even the so-called civilized nations like Persia and Greece, let alone the uncivilized, savage Arabs. [425]

The disgraceful and ruthless, inhuman general attitude to life and their false motives of war. Deviated from the path of Truth, they committed the most serious inhuman crimes against the defenseless captives. The Prophet of Islam, contrariwise, granted due human rights to them and enjoined upon the Muslim to behave them in a natural and human manner.

The Qur'an and the teaching of the holy Prophet (SAWS) have clearly laid down the principles of an ethical behaviour of the Islamic state towards the captives of war.

---

[424] Wesley L. Gould: An introduction to International Law, New York 1956 p.635.

[425] Majid Khadduri: War and Peace in Law of Islam. P. 126 London 1955.

CHAPTER 23

ISLAMIC FIQH AND THE ROMAN LAW AND THE POINTS OF DIVERGENCE BETWEEN THE TWO

Various views

The question of the relation between the shariah and 'Roman law' is a delicate subject which has produced considerable controversy. Some scholars contend that the shariah has been influenced by Roman law while others deny any such influence; some have taken a middle-of -the- road attitude.

The first group consists entirely of orientalists such as Goldziher (Vorlesungen uber den Islam),[426] Von Kremer (Culturgeschichte des Orients unter den Chalifen),[427] Amos (Roman Civil Law),[428] Emilio Bussi (Ricerche intorno alle relazioni fra retratto byzantino et musulm ano)[429] and others.

The second group includes Fayiz al-Khuri (al-Huquq al-Rumaniyah),[430] Arif al-Nakadi (al-Qada fi al-Islam),[431] Shaykh Muhammad Sulayman (Biay Shar Nahkum)[432] and others.

The third group is represented by Muhammad Uafiz Sabri (al-Muqaranat wa-al-Muqabalat)[433] Ahmad Amin (Fajr al-Islam[434] and Zuha al-

---

[426] See the French translation, Le dogme et la loi di l'Islam, 39.

[427] Published in Vienna, 1875; I, 532 ff.

[428] Pp. 406-415

[429] Published in Milan, 1933

[430] Published in Damascus, 1924; 9-12.

[431] Published in Damascus, 1922; 3. See Nakadi's valuable review of the first edition of this book in the bulletin of the Arab Academy, Majallat al-Majma al-Ilmi al-Arabi (Damascus, 1947), 261-67.

[432] Published in Cairo, 1936; No. 40.

[433] Published in Cairo, 1902; 5 and 186

[434] Published in Cairo, 1933; 290

Islam),[435] Atiyah Mustafa Musharrafah (al-Qada fi al Islam),[436] Dr. Shafiq Shihatah (al-Nazariyah al-Ammah li-al-Iltizam fi-al-Shar al-Islami)[437] and others.

It should be observed that the second and third groups consist entirely of Eastern jurists. On the whole, they have studied the question more carefully and meticulously than the first group. A number of them were accurate in their findings; others were influenced somewhat by their nationalistic spirit.

Most of the first group — which consisted entirely of foreigners — did not study Islamic jurisprudence thoroughly but were satisfied with a superficial treatment of the subject which cannot be regarded as adequate from the scientific standpoint. For example, Amos says categorically, "Mohamedan Law is nothing but the Roman Law of the Eastern Empire adapted to the political conditions of the Arab Dominions".[438] This sweeping judgment elicits disdain because it is an extreme exaggeration and is not supported by scientific evidence required in such historical research.

The gist of the arguments put forward by those who claim that Roman law influenced the shariah is in the real or alleged similarities between the two systems of law in a number of rules, the influence of the Hebrew laws, and the influence of customs in the conquered territories. In our view the discussion of the value of these arguments calls for an investigation of the following questions:

First — Are the alleged similarities worthy of attention, or are they trivial?

Second — is mere similarity a sufficient evidence of borrowing?

Third — What was the attitude of the Muslim jurists towards Roman law?

Fourth — What were the points of contact between the two systems? And what was the connection between this subject and the Hebrew laws or the customs in conquered territories?

---

[435] Vol.I, Published in Cairo, 1934; 278; and Vol.II, published in Cairo, 1935; 104.

[436] Published in Cairo, 1939; 117ff.

[437] Published in French, Cairo, 1936; 180.

[438] Amos,op.cit., 415, as quoted by Lee in Historical Jurisprudence, 322.

The extent of the similarities between the two systems

Von Kremer said[439] that the points of similarity between Roman law and the shariah were numerous. He mentioned as examples the maxim that the burden of proof lies on the plaintiff, the age of majority a number of rules concerning commercial transactions such as hire, sale and the distinction between sale and barter. Let us examine now the reality of these similarities and their explanation.

The maxim that the burden of proof lies on the plaintiff is based in the shariah upon the following tradition of the Prophet: "The burden of proof is on him who alleges; the oath on him who denies".[440] It is known that this tradition is older than the Muslim conquests of those countries which had been subject to Roman law, and therefore could not have been derived from it.

The alleged similarity in the distinction between sale and barter in both systems is unreal. Roman law makes a distinction between sale, i.e. the exchange of property for a sum of money, and barter, i.e. the exchange of property for property. Sale (ernptio-venditio) belongs to the category of consensual contracts, which were concluded by offer and acceptance, i.e., by the mere consent of the two contracting parties. In barter (Permutatio) on the other hand, consent is not sufficient for concluding a contract; such conclusion required, on top of consent, performance of the contract by one of the two parties to it.[441] Those who have studied Roman law realize the practical importance of the distinction. The Shajrah, on the other hand, did not take cognizance of this formal distinction; barter was merely one special type of sale through consent.[442]

Contracts of sale and hire in both systems show similarities in some of their general aspects because they are based upon the principles of commercial exchange which necessitated their existence. There are differences, however, in detailed rules, such as in the "option of inspection", and many other rules.

Lastly, there is no clear resemblance between the two systems with regard to the age of legal capacity. In Roman law this age was fixed at 12 years for girls and 14 years for boys.[443] The predominant view in the shariah, however, is that 15 is the minimum legal age of majority.[444]

---

[439] Op. cit., 533 and 536-37

[440] Suyuti, Jami Saghir, Nos. 3225 and 3226, on the authority of Bayhaqi and Tirmidhi.

[441] "Do ut des". See Girard, Textes, 627; and the Digest, D, 19,4

[442] Majallah, Articles 122 and 379

Thus, these examples of similarity are rather exaggerated, and, at any rate, are not convincing evidence that Roman law has influenced the shariah. Even if these examples were true, they are so few in number to be almost unworthy of mention in view of the many differences between the two legal systems. What is important is not the existence of a number of similarities but rather the importance of these similarities in comparison with the points of difference. The fundamental differences are numerous and would take too long to cite; but the following are a few exemples:

First — Roman women were under perpetual tutelage (tutela perpetua mulierum). They were not empowered throughout their lives to deal with their property without the permission of their guardians. The shariah on the other hand recognized in principle the complete capacity of women to perform all kinds of lawful transactions.

Second — The dowry in Roman law was a payment to the husband by his wife or one of her family, while in Muslim law the payment is to the wife by the husband.[445]

Third — Adoption is not recognized in the shariah[446] while it was an accepted institution in the Roman law.[447]

Fourth — Formalism and complication were evident in Roman contracts and in Roman rules of procedure, while the contrary was the case in the shariah. In the latter it is a maxim that effect is given to intention and meaning and not to words and forms.

Fifth — The transfer of debt was illegal in Roman law, while in Islamic law it was sanctioned by all schools of jurisprudence without exception.

---

[443] Justinian's Institutes, I, 22

[444] Majallah, Article 986.

[445] A correct (ai) tradition says, "Provide (a dowry) even though it be

a ring of iron." This tradition was reported in the two *sahihs*, in the Musnad of Ibn Hanbal, and in the Sunan of Abu DãDüd. See Suyuti, Jãmic Sag1ir, No. 1564.

[446] In accordance with the Qur'anic verse, ".. . nor has He made those whom you claim (to he your sons) your sons... Proclaim their real parentage." (Qur'an 33: 4-5). See the "Rules for Adoption in the Shariah", by the author in the Lebanese law bulletin, al-Nashrah a1-Qadaiyah al-Lubnaniyah, 1st year, I, 6

[447] "Adoptio et adrogatio." MAHMASSANI, Falsafat al-Tashri fi al-Islam ii

Sixth There are distinct differences between the two systems in questions of inheritance and wills. In the sharfCah (Sunni view), for example, a bequest (in a will) to an heir is unlawful, while in Roman law wills were originally instituted for the purpose of appointing the heirs.

Seventh — The rules of pre-emption and family waqf (endowm ents) have no parallel in Roman law.

Significance of Similarities in Themselves

What is the significance of similarities in themselves if found between two legislative systems? Does their existence furnish sufficient proof of the one borrowing from the other?

There is no doubt that the mere existence of similarities is generally not sufficient to prove borrowing.

It is necessary here to make a distinction between fundamental principles and subsidiary rules. Fundamental principles such as the prohibition of murder, theft, adultery and the like stem from the principles of primary justice. They are, therefore, eternal and invariable. So, it is not surprising, to find that such principles are similar in ancient as well as in modern times, under varying conditions and in different territories, regardless of whether a tradition of intercourse and interchange had or had not existed between them.

Subsidiary rules on the other hand are not always similar. In most cases they differ depending on such things as time, place and peculiar social conditions. But similarities are by no means impossible to find; if they are found, their origin cannot be ascribed solely to borrowing, as it is reasonable to presume that they might have other origins.

Rules are based upon causes and reasons. If such reasons and causes should be similar in two countries, it would be logical to expect that the rules based upon such causes to be similar as well, in confomity with the maxim that similar causes give rise to similar results. This maxim is not peculiar to legal rules; it embraces all social activities, as can be seen in the similarities between different civilizations.

A clear example of this is apparent concerning the adoption of children. Adoption, known to the ancient Hindus and to the Romans, came into existence because of the fear of the head of family that he might die without heirs and because of a strong desire to find someone who would continue the family traditions after him and perform the rituals for sanctifying the memory of the dead.[448] Does this similarity between the legal systems of these two remote peoples indicate that one of them borrowed the institution of adoption from the other? If this is claimed, what proof is there to substantiate it?

There are numerous examples of this kind, e.g., the similarity between the Islamic and the English systems concerning the acts of an unauthorized agent, or that concerning some aspects in the theory of the abuse of rights. Does the existence of these similarities mean that one of them has taken from the other despite the existence of conclusive evidence to the contrary? Could it be said here that the shariah has borrowed from the English system? Such a contention would be unreasonable, considering that the former is older than the latter and was in existence even before it came into being. Or could it be said that the English system borrowed from the Islamic shariah, in spite of all evidence to the contrary? The English legal system originally did not even draw on the neighboring European systems; how much less is the possibility of borrowing from a distant system such as the Islamic?

It has always been a phenomenon of human nature that the various civilizations show striking similarities in their fundamental principles and present occasional resemblance in some of their subsidiary rules if the causes of these rules and the interests they are intended to serve were the same. Therefore such similarities as may exist are not in themselves sufficient evidence of borrowing.

Thus, similarities are almost inevitable between legal systems. We recognize that similarities must necessarily exist between the Islamic and the Roman systems both in their fundamental principles and in some of their subsidiary rules. This explains the striking similarities between many of the maxims in the shariah and their equivalent Latin maxims. At any rate many of these Latin maxims were not originally a part of Roman law; they were later added to it in the Renaissance by the annotators who had been graduated from the Bologna school in Italy and from other European schools. It is possible that those annotators were influencet by the Arabic culture which reached them via Spain and other territories in the same way as the (European) trade and industry was influenced by the Arabs via the countries contiguous to the Mediterranean. The libraries of Europe are still rich in Arabic books and manuscripts and the European languages still carry many an Arabic word. One example may be sufficient to prove this point:

---

[448] Maine, Ancient Law, 114; and de Coulanges, La cite antique, 55-56.

It is established in the history of commercial law that bills of exchange and *hawalah* (instrument for transfer of debt) were not known in Europe before the 12th century A.D. although they had been recognized by all books of Islamic jurisprudence, and particularly the Hanafi books, which go back to the 8th century A.D. It has been said that these instruments were made known to the West four centuries later via Italy during the Crusades and via Spain when it was still an Arab country. The Arabic influence may be discerned through the imprint the word "*hawalah*" has left, for it is said that the French word "aval", which connotes the endorsement of a bill of exchange by a third person for purposes of guarantee, is derived from the Arabic word "hawãlah", and that the French word "avaries", which is used in maritime law to mean damages at sea, is also derived from the Arabic word "*iwar*".[449]

We would not have cited the aforementioned examples had it not been for the fact that some historians, in disregard of historical facts, claim that all laws of the Arabs and the Muslims are borrowed from the Romans. If the Romans had known the bills of exchange, those historians would not have hesitated to ascribe their origin to the Romans.

The Attitude of the Muslim Jurists towards Roman Law

There is no doubt that the Muslims were not acquainted with Roman books of jurisprudence, that they did not translate any of those books and that they did not make any reference to them. If they had known those books, they would have acknowledged the fact in their books as they have duly acknowledged the translation of Greek and Persian books on science, literature and philosophy. The influence of these latter books is apparent in Muslim books and in the words borrowed the reform.

The reason why the Muslim jurists refrained from studying Roman law was their firm conviction that the shariah was divine; that it was fundamentally founded upon the Qura'n; and that it was the example of perfection in jurisprudence. Therefore, they rejected everything that did not emanate from Muslims in this field. Von Kremer himself admits this fact[450] in spite of his claim concerning the influence of Roman law on Islamic law.

---

[449] See the article by Paul Huvelin based on Grasshoff in Annales de droit commercial (1901), 1-30, and particularly 22-26.

[450] Op. cit., 533-34.

Furthermore, if the jurists of Islam were acquainted with Roman law books, they would have borrowed the general theory of obligations and contracts which is regarded as the Romans' greatest achievement in the field of jurisprudence, and the books of shariah law would not have lacked this general theory.

The Relationship to Hebrew law

How then, it may be asked, was the shariah influenced by Roman law; and what route did such influence take? Von Kremer has answered that this influence found its way to the shariah via Judaism and also through the customs and usages prevalent in the conquered territories. He conceded, however, that this assertion must be viewed with some skepticism.[451]

Is is easy to refute the first allegation concerning Judaism, because the predominant view of Muslim jurists consider the principle that "the laws of our predecessors are laws unto us" an imaginery source of law. Therefore, the rules of the Hebrew system of law are unacceptable to the Muslims unless textual provisions or consensus of opinion endorse such rules.

Admittedly, some writers, including Abraham Geiger in his book *Was hat Mokammed aus den Judent hum aufgenommen*,[452] have pointed to the existence of similarities between the two systems in a number of questions such as *iddah* (the period of waiting for a woman before remarriage) and the period of lactation. But similarities in such minor matters are inconsequential because differences exist in other and more important matters. For example, marriage between third degree relatives, such as an uncle and his niece, was not prohibited according to Hebrew law.[453] The Islamic shariah, on the other hand, prohibits such marriages. "Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters...".[454]

---

[451] Zweifelhaft" (doubt) ; von Kremer, op. cit., 537.

[452] See the English translation by F. M. Young, Judaism and Islam, 69-70.

[453] See the Jewish Encyclopedia, "Marriage"; Hasting's Dictionary of the Bible; Article 22 of the Ottoman Law of Family Rights of 25 October 1333 A.H.; and R. Robert's Social Laws of the Qoran, (London, 1925), 14. In the Old Testament, see Leviticus 8 7-17, 20 : 11-21, and Deuteronomy, 22 : 30, 27 : 20, and 27 : 22-23, where marriages with daughters of a brother or a sister were not included among forbidden unions.

[454] Qura'n 4: 23.

Moreover, the shariah prohibits marriage between foster relatives, whereas Hebrew law does not prohibit such a marriage.[455]

Finally, it is incumbent upon the heirs, according to Roman law, Hebrew law, and some Latin laws including the French civil law, to pay off the debts of the deceased even though they exceed the inheritance. But in the shariah and in a number of modern legal systems such as the English and the German, heirs are not obliged to do so.[456]

Roman Customs in Conquered Territories

The impact of these customs upon the Islamic shariah is a subject for study and investigation. It is established that the fundamental source of the shariah is the texts of the Qura'n and the traditions; that those texts were transmitted to the Muslims through the Prophet by divine revelation in the first phase of the development of Islamic jurisprudence when Islamic society did not extend beyond the Arabian peninsula and did not as yet come in contact with Roman culture. It is also a fact that the Roman attempts to invade the Arabian peninsula had met with failure since early times.

However, when the Muslim conquests expanded and the Muslims occupied a number of territories hitherto under Roman rule, such as Egypt and Syria, Muslim jurists and judges started to corelate the customs prevalent in these territories with the sources of the shariah. Those customs which were found in agreement with the provisions, aims and philosophy of the shariah were retained and incorporated by having recourse to interpretation through consensus, preference, public interest and other sources of law. Customs which ran counter to the shariah were discarded and prohibited.

It is essential to point out that those customs were not purely Roman; they were commercial usages common to all ancient peoples, particularly the peoples of the Mediterranean. The Romans themselves had been influenced by these usages and had incorporated them in their laws under the title “Jusgentium”[457] to distinguish them from the original Roman law known as the “Jus civile”.

---

[455] See Articles i8 and 26 of the Ottoman Law of Family Rights.

[456] De Coulanges, La dté aitique, 77; Sabri, Muqãranat, Article 331; and Ramli, Fatäwa, II, 64 and 73.

[457] Pollock, Introduction, 12.

At any rate, Islamic jurisprudence assimilated not only these common commercial usages but also parts of usages and customs prevalent in all countries which had become subject to Muslim rule. Some of these countries such as Iraq, Persia and Turkestan, had not been subject to Roman rule. We can see how customs prevalent among the people of Balkh and Bukhara had motivated the Hanafi jurists to sanction sale subject to a right of redemption (bay bi-al-wafa). Generally speaking, peoples, like individuals, do not live in isolation, but are parts of a whole; they participate with each other in all kinds of intercourse and exchange.

Peoples exchange culture, science and customs in the same way as they exchange commodities and industrial arts. Imitation between peoples, like imitation between individuals, is a primary factor in economic and social life. All historical events have their influence upon the emergence and development of civilization, and the Islamic conquests were no exception to this rule. They caused Islamic culture to mix with ancient cultures in the conquered territories, with the result that an undeniable mutual interaction took place.

Conclusion

It can be concluded that similarities between the Islamic and the Roman systems are very trivial in comparison with their differences. It can be concluded also that these similarities themselves offer no proof to the effect that the former had been influenced by the latter.

Furthermore, the Muslim jurists adopted a negative attitude towards Roman law in view of their belief in the Divine origin of the shariah. Those customs which were found in conquered territories and which did not conflict with the texts nor with the fundamental principles of the shariah were accepted and retained.

At any rate, these customs were not purely Roman, but were common usages regulating commerce and known to the Arabs as well as to the other Mediterranean peoples. The Romans themselves had been influenced by these customs and had incorporated them into their laws prior to the Muslims. The sharia'h retained a number of foreign customs. Similarly, it left its mark upon new and emerging civilizations, as we have already explained.

Aside from these slight influences, it is undoubtedly a fact that the shariah is independent of, and not borrowed from, any other system. It owes its origin to the commands of Allahs and His Prophet's sayings enshrined by the Book of Allah and the sunnah of the Prophet. It possesses its own incomparably glorious history. The delegates of al-Azhar University to the International Conference on Comparative Law, held at The Hague in 1937, succeeded in convincing the conference to adopt a resolution to this effect.

SECTION-THREE

BRIEF INTRODUCTION TO SOME UNISLAMIC CONSTITUTIONS AND LAWS GOVERNING THE MOST PART OF THE CONTEMPORARY WORLD WITH SPECIAL REFERENCE TO THEIR DISTINCTIVE FEATURES

In the course of the comparative study of the sacred law of Islam the study of the positive legal systems in force in major countries of the contemporary world is of great import. For the same purpose the author thinks it appropriate to cast a look at the constitutional histories of the select major countries of the contemporary world. On the basis of the short history a dispassionate scholar will be in better position to assess the limits of the historical background and motivating factors at work behind the origin and development of those legal systems. Also, a critical study of those laws will also enable the readers to determine the dimensions of influence and impact the law of Islam cast on them.

CHAPTER 24

From among many facts the study of the legal systems of different countries makes clear the most outstanding one is that the British Constitution has been the primary source of most of the positive legal systems so that it has served as the prime guide for the authors of those constitutions. Our discussion, therefore, will start from the British Constitution.

THE CONSTITUTION OF THE GREAT BRITAIN AND THE NATURE OF THE CONSTITUTION

Does Britain Have a Constitution?

Thomas Paine and Alexis De Tocqueville are of the opinion that 'England has no Constitution'. Thomas Paine declared that "*where a Constitution cannot be produced in a visible form, there is none*". In a spirited reply to Burke who defended the existence of the British Constitution, Paine asked, "Can Mr Burke produce the English Constitution? If he cannot, we may fairly conclude that though it has been so much talked about, no such thing as a Constitution exists or ever did exist." Similarly, De Tocqueville said that "in England, the Constitution may go on changing continually or rather it does not exist."

The Constitution of England is unwritten as most of the rules and principles controlling the distribution and regulating the exercise of governmental power have never been reduced to writing in a single document and most of the constitutional principles and rules in England have grown by experience. The English Constitution is a product of many centuries of political growth. It is not the handiwork of any Constituent Assembly but a consequence of a Convention. Much of it has never been formally adopted at all. It can be amended at any time to any extent by a simple action of Parliament. "If Constitution means institution and not the paper which describes them, then the British Constitution has not been enacted but has evolved." Looking to all this it may be said that **'England has a Constitution but mostly of an unwritten type'**.

It may not however, be presumed that the English Constitution is entirely unwritten. There are certain charters, petitions and statutes in which some of the principles of the Constitution have been embodied in writing. Among these, the important ones are the *Habeas Corpus* Act of 1679, the Act of Settlement of 1701, Fox's Libel Act of 1792, the Reform Acts of 1832, 1867 and 1884, the Municipal Corporations Act of 1872, the Judicature Acts of 1873-76, the Local Government Acts of 1888, 1929, the Parliament Act of 1911, the Representation of the People Act of 1918, the Equal Franchise Act of 1928, and the Statute of Westminster of 1931, Indian Independence Act 1947. Thus, it is clear that England has a constitutional structure though it is one which lacks symmetry. The Englishmen have shrunk from any effort to reduce their Constitution to systematic codified form. They have "left the different parts of their Constitution where the waves of history have deposited them", without ever attempting "to bring them together to classify or complete them, or to make it a consistent or coherent whole". According to Munro, "*The British Constitution* *is a complex amalgam of institutions, principles and practices. It is a composite of charters and statutes, of judicial decisions, of common law, of precedence, usages and traditions. It is not one document but hundreds of them. It is not derived from one source but from several... It is a child of wisdom and chance."*

Sources of the English Constitution

From what has been written in the preceding pages, it is clear that the British Constitution has been derived not from a single source but from different sources. We can divide these sources into five groups:

(1) Conventions

Firstly, there are some principles of the Constitution which are based on what Dicey has called, "the conventions of the Constitution". In fact, the workability of the English Constitution is based upon conventions without which it would become unworkable. These conventions are regarded as sacred as laws of the Constitution. Their importance lies in the fact that fundamental principles of the English Constitution like the sovereignty of Parliament and Ministerial responsibility to the Parliament upon which the successful working of democracy depends, are regulated by conventions. It has been rightly opined that without the conventions, the British Constitution is like a skeleton without flesh and blood. The most important conventions in England are as follows:

(i) The Queen or King must accept the advice of the Cabinet.
(ii) No tax can be levied without the sanction of Parliament.
(iii) The Parliament must meet at least once a year.
(iv) The leader of the majority party in the House of Commons must be appointed as the Prime Minister.
(v) The Cabinet is collectively responsible to Parliament.
(vi) The Parliament shall consist of two chambers.
(vii) Only the law-lords shall attend the meetings of the House of Lords for deciding judicial cases.
(vii) Once a speaker always a speaker.
(ix) Pairing Convention.
(x) Mandate Convention.

A detailed discussion of these conventions we shall make elsewhere.

(2) Charters

The second important source of the English Constitution is discernible from the great charters and agreements which define and regulate the powers of the Crown and the rights of citizens, etc., Such charters have become historic documents and, therefore constitute, an important part of the British Constitution. Among these documents, the important ones are the following:

(i) *Magna Carta (1215):* It defined the organisation and powers of the Great Council in England and prohibited the imposition of certain taxes without the consent of the Great Council.

(ii) *Petition of Rights (1628):* It laid down that no person in England can be compelled to pay any loan, gift or tax without the previous sanction of Parliament.

(iii) *Bill of Rights (1689):* It made the Parliament the supreme law-making body and declared that it should be called regularly. It also provided a list of individual rights.

(iv) *Act of Settlement (1701):* It fixed certain rules regulating the order of succession to the British throne.

(v) *Act of Union with Scotland (1707):* It contains some provisions which have permanently united Scotland with England under one common Government.

(3) Statutes

The third important source of the English Constitution lies in the statutes (laws) passed by the Parliament from time to time. It may be noted that the British Parliament is fully empowered to repeal or amend these statutes whenever it likes. The following are the important statutes of the British Parliament:

(i) *Reform Act of 1832:* This Act extended manhood suffrage to urban middle classes of England.

(ii) *Parliament Act of 1911:* It curtailed the powers of the House of Lords and permanently established the supremacy of the House of Commons. It also reduced the life of the House of Commons from seven to five years.

(iii) *Representation of People's Acts of 1918 and 1928:* These Acts established the principle of universal adult suffrage by guaranteeing the right of vote to women as well.

(iv) *Statute of Westminster Act, 1931:* It recognised the independence of the dominions of Canada, South Africa, Australia and New Zealand.

(v) *Indian Independence Act of1947:* It handed over all political powers to India and Pakistan by the division of India.

(vi) In April 1969, the voting age was lowered to eighteen years by an act..

Besides, the Parliament has also enacted other laws, such as the Local Government Acts of 1888, 1924, 1933; the Abdication Act of 1936 and the Ministers of Crown Act of 1937.

(4) Judicial Decisions

Judicial decisions constitute another source, which refers to the judgments and interpretations of the British courts which define the scope and limitations of the different charters, statutes and common law of England. So great is the importance of judicial decisions that Dicey termed the British Constitution as a judge-made Constitution. Quoting a few illustrations are the decisions in Bushell's case (1670), establishing the independence of juries, and the Howell's case (1678), vindicating the immunity of judges.

(5) Eminent Works

Some of the eminent works written by authorities on the subject also form a part and parcel of the Constitution. May's *Parliament Practice,* Dicey's *Law and Constitution,* Blackstone's *Commentaries on English Constitution* are some of the notable examples of such work of great eminence.

(6) Common Law

Common Law may be defined as an "*assemblage of all those rules and important principles, which are the product of slow process of long historical growth, being based upon the customs and traditions of English society, and later on recognised by the Courts of the country*". Such rules are apart altogether from any Act of Parliament and include many of the most important features of the governmental and legal systems and are fully accepted and enforced as law. The prerogatives of the Crown, the right of trial by jury, the right of freedom of speech and of Assembly, the right of redress for tortuous acts of governmental officers, rest almost entirely on Common Law. Ogg points out Common Law in course of centuries "*acquired binding and almost immutable character*".

Thus, the English Constitution is composed of not one element, but varied elements. However, its major part is unwritten. Hence, a French writer compares it "with a river whose surface glides slowly, past one's feet curving in and out and almost lost to view in foliage". Lord Bryce has summed up the sources and nature of the English Constitution in the words, "*It is a mass of precedents carried in men's minds or recorded in writing, dicta of lawyers and statesmen, customs, usages, understandings and beliefs, a number of statutes mixed up with customs and all covered with a parasitic growth of legal decisions and political habits.*"

SALIENT FEATURES OF THE ENGLISH CONSTITUTION

An appraisal of the nature and sources of the English Constitution and its gradual evolution enables us to derive the following important features of the British Constitution:

(1) Partly Written and Partly Unwritten

The first important feature of the British Constitution is its unwritten character. But by unwritten we do not mean that none of its principles are written. There are several written parts of the British Constitution, like the *Magna Carta,* Bill of Rights (1689), Reforms Acts, Parliamentary Act of 1911, etc., but the unwritten part is more conspicuous and impressive than the written one. However, by unwritten we mean that (i) the written part of the British Constitution is lesser than the unwritten one; (ii) the written part was not written at one time; (iii) whenever an Act was made, the purpose was not to improve the whole of the Constitution. The English Constitution is largely based upon the customs and conventions of the British society.

(2) Evolutionary

The British Constitution is a child of wisdom and chance. It has evolved itself gradually, expressing itself in different charters, statutes, precedents, usages and traditions. It has grown like an organism from age to age. In the preceding chapter, this evolutionary growth of the British Constitution has been elaborated and very well illustrated. It is the oldest among existing Constitutions. Its general framework has undergone no revolutionary overhauling for at least the past three centuries with the exception of the half dozen years in which Oliver Cromwell served as the "Protector of the Commonwealth." England has not witnessed a revolution comparable with the French Revolution of 1789, or the Russian Revolution of 1917. The British Constitution has not undergone sudden transformations at specific times and whatever changes have come from time to time, have not deflected the main current of political development. In the words of Freeman, "*At no time has the tie between the present and the past been rent asunder; at no moment have Englishmen sat down to put together a wholly new Constitution in obedience to some dazzling theory*". The political changes "have as a rule been so gradual, deference to traditions so habitual, and the disposition to cling to accustomed names and forms even when the spirit has changed, so deep-seated, that the Constitutional history of Britain displays a continuity hardly paralleled in any other land".

(3) Difference between Theory and Practice

One of the unique features of the British Constitution is the gap that exists between constitutional theory and governmental practices. In England, "nothing is what it seems to be, or seems to be what it is". In theory, the Government of England is vested in the Crown. All officers of Government are the servants of the Crown, summoned and dismissed at royal discretion. No law is effective without the Crown's consent; no appointment is ever made save in the name of the Crown. No parliamentary election can be held save in obedience to the King's writ. The King is the Commander-in-Chief of all the British forces. The King alone can declare war and conclude peace and treaties. It is the Royal Navy, His Majesty's judges, His Majesty's Government, His Majesty's "loyal opposition" and even His Majesty's subjects. It reflects as if, the King is the source of all power and fountain of justice.

But all this is in theory. As Ogg remarks, "*The Government of the United Kingdom is in ultimate theory an absolute monarchy, in form a limited Constitutional monarchy and in actual character democratic republic.*" In practice, the King has become merely a figurehead. He reigns but does not rule. Through gradual stages, all political power has shifted from the King to the people's representatives in Parliament. The King has now long ceased to be a directing factor in Government and he virtually performs no official acts on his own initiative. Practice has quite overturned theory, as Ogg remarks, "*There have come to be, in a sense, two Constitutions rather than one – the Constitution that represents the system as it is supposed to be and the Constitution that represents it as it actually is.*" The truth is that the King, if he acts at all, acts only through Ministers. England has become today not only a 'limited monarchy' but to use the phrase of Mr. and Mrs. Webb's a "*crowned republic*".

(4) Parliamentary Sovereignty

The sovereignty of the Parliament forms another important feature of the British Constitution. There is no law which the British Parliament cannot make or unmake. No court can question the legality of its Acts. There is no legal difference between the constituent authority and law-making authority in England as it exists in the United States or India. The British Parliament is both the law-making and constituent authority. It can even change the succession to the throne by a simple Act and even prohibit the King to marry a woman of his choice. It can abolish the monarchy, deprive all peers of seats in the House of

Lords, or abolish that chamber altogether. It can, in fact, do any or all of a score of other things that would amaze any student of the British Constitution. It can, observes Anson, "make laws protecting wild birds or shell-fish, and with the same procedure could break the connections of Church and State, or give political power to two millions of citizens and redistribute it among new constituencies". The British Parliament has, of course, done all these things and even more. A critic remarked, 'Parliament can do everything but make a man a woman and woman a man'. A harsher critic opined, 'it can do that also'. So far as legality is concerned, the British Parliament is supreme and sovereign. As Ogg remarks, "*The truth is that while Parliament operates under plenty of practical restraints—moral inhibitions, public opinions, international law, and international agreements, it nevertheless is legally unfettered, with any and of all its actions, immune from annulment except by its over action.*"

(5) A Unitary Constitution

The British Constitution is a unitary and not a federal one. A federal Constitution is one wherein the governmental powers are distributed among certain agencies, federal and divisional, neither of which has a power to alter the constitutional provisions. The important thing is that the distribution is done by authority superior to both federal and divisional Governments. The United States has a federal Constitution. Hence, some powers are retained by the Centre whereas the rest of the powers are with the states- the units. But in England, the Government is unitary. The entire power is concentrated in a single Government of centre, at London. The local areas derive their powers from London Government. The latter has endowed them with such powers as it chooses to bestow and can change their powers at any time or even abolish them altogether and arrogate the authority in entirety. Thus, the British Constitution is unitary both in form and spirit.

(6) A Flexible Constitution

The British Constitution is flexible in nature. There is no difference between the procedure for the passage of a constitutional law and that of an ordinary law in England. The British Parliament is empowered to pass and amend the ordinary law as well as the constitutional law through the same ordinary procedure. There is no special procedure for passing a constitutional law in England. This flexibility of the Constitution permits it to be adapted more readily to the new conditions than is possible in any federal country.

It may however, be noted that the flexibility of a Constitution does not depend primarily on the breadth of its provisions. Though legally the

Constitution of England is the most flexible in the world, yet actually "it is considerably less fluid than might be inferred from what the writers say". If the Constitution is couched in broad terms so as to permit changes in governmental practice without any formal amendments, there will be little need of amending the Constitution. This is true of the Constitution of the United States. But surprisingly the same is the case with the British Constitution. The English people are conservative and tradition loving having a Constitution broad enough to permit changes in governmental practice if at all they so like. Hence, few changes in it have been made over considerable period of time as people are fondly satisfied with precedents already set.

(7) Rule of Law

Another important feature of the British Constitution is the rule of law. It has never been expressly enacted as a statute, but is implicit in the various acts of Parliament, judicial decisions and in the Common Law. As defined by an English jurist, the Rule of Law means, "*The supremacy or dominance of law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law, of determining or disposing of the rights of individuals*" *7* In England, it may be noted, there is no act which lays down the fundamental rights of the people. But it does not mean that the Englishmen enjoy no rights. On the contrary, their rights are as secure as in the United States or India wherein Constitutions have defined specifically the rights of citizens. The security of the rights of British people is secured to them through rule of law. The citizens, the courts, the administrative officials, the King, all are subject to it. Under the rule of law, "obligations may not be imposed by the State, nor property interfered with, nor personal liberty curtailed, except in a legal manner and on legal authority". Of course, the Parliament has the legal power to limit, suspend or even withdraw any specific right, but tradition and public opinion will not tolerate any infringement not explicitly necessitated by national emergency. Moreover, the fundamental rights even in the countries having express constitutional provisions incorporating them, are subject to limitations in the interests of national well-being. The fact is, as Ogg observes, "*That although at first glance private rights seem to enjoy no such sheltered position, in Britain as elsewhere, they are, both in law and in practice, not a whit less secure on that account. After all, it is not in such matters paper decorations that ensure results, but rather the sanction of tradition, principle and public opinion.*"*

(8) A Parliamentary Form of Government

England has a parliamentary form of Government as distinct from the presidential type of Government. The King is the nominal head of the State. The real functionaries are the Ministers who belong to the majority party in the House of Commons and remain in office so long as they enjoy its confidence. As the Ministers are also the members of the Parliament, so there is coordination between the executive and legislative wings of the Government. In the words of Bagehot, the Cabinet in England is a "*hyphen that joins, the buckle that binds the executive and legislative departments together*". In England, there is little risk of conflict between the executive and legislature and the work of the Government, therefore, goes on smoothly. It is on account of the parliamentary system prevailing in England that the British Constitution has been called the "Mother of Parliaments".

(9) Separation of Powers combined with Concentration of Responsibility

Montesquieu found the British governmental structure based on the principle of separation of powers. Apparently, it is so. The Crown is the executive; Parliament is the legislature; the Courts form the judiciary. The executive in its purely executive and administrative capacity is not subject to so much control by the legislature as it is in the United States. In England the judiciary also takes no part in determining the law as does the American judiciary through the process of judicial review. Nevertheless, the Cabinet in England has assumed a dominating role not only in administration, but even in legislation and to some extent in judiciary as well. In the United States, the role of the Cabinet is not so dominating as it is in England. The British Cabinet has become the steering wheel of the ship of State, reducing the Parliament to a tool in its hands. As Ogg remarks, "*At London, concentration of responsibility, implicit in the Cabinet system and held back by no constitutional barriers, cuts through every obstacle and brings the Prime Minister and his colleagues into the position of an all powerful Government, leaving it to Parliament and the Courts merely to regulate and check its action.*"

(10) A Blend of Monarchy, Aristocracy and Democracy

The British Constitution has harmoniously blended within itself the three somewhat incongruous features of monarchy, aristocracy and democracy. The British King represents the monarchy which rests on the hereditary principle. The House of Lords is the aristocracy, representing the lords and nobles of the land. The House of Commons is the democracy representing the people of the land. It is true that neither the King nor the House of Lords plays an effective role in the political set-up of the country, yet their continuance appears hardly reconcilable with democracy. And yet the Englishmen had never been in a mood to abolish these historic institutions, though attempts have been made to denigrate the position of the Monarch and curtail the powers and change the method of constituting the House of Lords. In case of Monarchy perks of sovereign have been curbed.

(11) A Bicameral Legislature

The Parliament is bicameral. The House o Commons, the Lower House, is a directh elected chamber composed of six hundred anc fifty-one members and the House of Lords i a hereditary chamber presently comprised o over 746 members. The Lower House is mud more powerful than the House of Lords Hence, the, latter is portrayed as a 'secondar) chamber' and Westminster Abbey of living Celebrities.

CRIMES AND PUNISHMENT IN ENGLAND DURING THE MIDDLE AGES

As it has already been put, for the most of the present day secular laws of the world the British Constitution and law has been regarded the primary source and the most constitution a lists of the world have placed before them the British legal system as the guiding light. In other words, the British constitution has been the chief source of most of the world constitutions. The British constitution is largely unwritten, chiefly sourced from the age-old British religious and social traditions and public usages. Those traditions, in most cases, are so contradictive and foolish as seem laughing stock for today's 'enlightened' world. What follows is a brief review of some of the laughable traditions vis-a-vish crimes and punishments in England during the Middle Ages.

In England during the Medieval period life was very hard. The lives of all the people, especially the pheasants, were made a lot harder with the law and order which England was ruled with. During the reign of Henry 2nd a new law system was created. Henry's law system said that any person found guilty must go through an ordeal. There were two ordeals that an accused person could go through.

ORDEAL BY FIRE: The accused person had to hold a red hot iron bar and walk three paces. His hands were then bandaged up and left for three days, if their hands got started to heal, they were innocent, otherwise they were regarded guilty.

ORDEAL BY WATER: The person was tied up and thrown into the ocean, if they floated, they were innocent, if they sank, they were guilty.

ORDEAL BY COMBAT: This was normally used for the nobody. The noble who was accused would fight with the person who accused him/her. The winner was right, the loser was most probably dead by the end of the fight.

In 1215 a jury and trial system was introduced. The accused would go before a jury and be tried. Most people didn't like this idea though because they thought that their neighbour might find it as an opportunity to have revenge on them.

In 1275 if a person was found guilty of a crime, their punishment was extremely severe.

PUNISHMNET of Theft: If found guilty, the accused would have their hands cut of. WOMEN WHO COMMITTED MURDER: Would be strangled and burnt. HIGH TREASON: Hung, drawn and quarted.
ILLEGAL HUNTING: Ears cut off.

Forms of torture of the Church

The church in Medieval times world punish people who fell asleep during the services or didn't go to church. Sometimes the church or country will torture people of other religions in order to force them conform them to the Christian Baptist/religion of that country.

Rosary: Was used for people who did not go to church or fell asleep during the service.

The Church also would torture the people to make them conform to and believe and take up the Catholic religion. The torture was both deadly and extremely painful.

The church could not sentence the heretics to death. For this purpose the church would use the Head DEVICE. This device was large enough to fit the Heretic's head in, then the device would be turned and tightened. This resulted in the victims head being crushed. The teeth of the victim were also crushed and the bones were broken, eventually the eyes of the victim would fall out of their sockets from the immense pressure the had was under.

Head Device

Heretic fork: this was a two sided prong that went through your chain and your chest. You could not talk with instrument in place and it was very painful.

Forms of Torture

There were many forms of torture in force in the Medieval period. These tortures were used as punishment to force Jews, Muslims and other non-believers into accepting Christianity, or they could be used as a way to make people tell into accepting the truth or tell what they knew about a certain person.

Below are some of the most common forms of torture common in the medieval period. Most of them were used to get a confession out of the accused individual.

Baker's Chair: for bakers who sold too many loaves of bread, which were too small.

Thumbscrews: The thumbscrew was simply placed on the thumb and tightened until it crushed the thumb. The tool was also used on toes.

There were many forms of torture that destroyed the genitals of both males and females. Such tortures included the tooth bars, the Spanish donkey and the juda cradle.

The tooth bars were used for males only. They would literally crush the male testicles. The Spanish donkey, one of the most painful form of torture ever performed, was that the victim would sit on the Spanish donkey, Weights would be placed on the victim's foot until the weight was so great that it destroyed the genitals.

The pear was also one of the most torturous mode of torturing women. The pear was a metal object that was shoved inside the mouth of anal cavity and vagina. Once in place, the screw at the end was turned and the pear opened up inside of the cavity. This caused much damage and often would lead to death.

More forms of Torture

The Breast ripper: is self explanatory. The sharp instrument would literally rip the breasts of the accused females.

Torture was so extreme because the "police" and people in charge believed that if people were afraid of the consequences of breaking the law, they would hardly dare to violate the law of the land.

The Rack: The victim was bound on an oblong wooden frame with a roller at each end. If the victim refused to answer questions, the rollers were turned until the victim's joints were pulled out of their sockets.

The Branks: was a mask that had a metal piece that goes in the mouth. The mouth piece has spikes on it, which makes one unable to talk.

The Juda Cradle: The victim was hung above a cone pyramid type object and then was lowered upon it, the sharp tip of the cone or pyramid was forced into the area between the legs. This was an extremely horrible form of torture.

The Whirligig: This was one of the tortures that was not regarded so horrendous. The whirligig just span the accused individual around and around until they vomited.

Cat Paw: This was a short pole with a pitch fork at one end; it was used to tear the flesh of the victim.

The chair of spikes: Literally a chair of spikes. The victim would sit in the chair and weights would be applied onto the victim forcing his body into the metal spikes.

Tongue slicer: This scissor-type instrument was used to slice the tongue up after the victim's mouth was forced open.

The Copper Boot: The foot was placed inside the boot and filled to the brim with molten lead to cause first degree burns.

The sprinkle filled with molten metal and dripped on the stomach, back and other body parts of the victim.

Water Torture: the victim's nostrils were pinched shut and fluid was poured down his throat. Instead of water, sometimes vinegar, urine, or urine and a combination of diarrhoea were forced down the throat.

TOWER OF LONDON

The tower of London was one of the worst prisons in history. The tower housed many criminals and many murderers and torturous activities were practised in the tower.

Many were the deaths in the Majesty's Tower of London.

YEAR	PERSON	REASON	DETAILS
1196	Fitzosbert William	Protesting against the taxation levied for the rescue of Richard I.	Hanged in chains
1226	Herlisun John	Murder of Lambert Leglis	Pardoned henry the 8th
1540	Lord Grey Leonard Viscount Grane	High treason in Ireland	Beheaded on Tower Hill in 1541
1586	Savage John	Babington conspirator	Hanged, drawn and quartered on 20 Sept. 1586
1586	Babington Anthony	Involvement in the Plot to murder the Queen and proclaim May, Queen of	Hanged, drawn and quartered at Lincoln's Inn

		Scots.	Fields on 20 Sept. 1586
1615	Weston Richard	Administering poison to Overbury	Confessed and was hanged at Tyburn
1671	Overskeldt Daniel van	Suspected Dutch Spy.	An exchange prisoner in 1674
1615	Mrs. Anne Turner	Supplying poison to those responsible for Overbury's death	She was hanged at Tyburn in Nov. 1615
1605	Keyes Robert	Involvement in the Gunpowder Plot	Hanged at Old Palace Yar4d with Guy Fawkes

These are just some people that were prisoners in the Tower of London. Most of them were hung or executed. You can also see why they were hung/ executed.

Some people who were executed within the walls of the Tower were: William le Marish, William Wallace, Eleanor, Duchess of Gloucester, Henry VI, Edward V and Richart Duke of York, Clarence brother of Richard Duke of Gloucester and many, many more.

Stocks and pillories; the Humiliation

Stocks and Pillories were used for humiliation. The stocks were a form of punishment. They were used for crimes that were not considered so severe.

In 1495 law required vagabonds to be in the stocks for three days, living on bread and water. By 1351 every town was required to have and maintain a set of stocks.

Crimes that attracted as punishment the stocks were crimes such as: Drunkenness (6 hrs at the stocks), drunkard (4 hrs) and swearing (1 hr).

All these crimes could have avoided the stocks, if the accused could pay the fine for the crime they committed.

Once a person was at the stocks, they were "at the mercy of the mob". Once the accused was at the stocks the crowd would pelt them with anything that could literally fit in their hands. The crowd threw vegetables and fruit that were rotten, mud, dead rodents especially rats, excrement and stones.

The individual not only suffered humiliation, abuse and mockery but also the pain of not being able to move. Some individuals even had their ears nailed to the stocks to prevent them moving. Sometime, in order to avoid the rotten vegetables and other items that were thrown at them, the accused would move and in the process rip their ears, which was extremely painful.

Some people in history that suffered humiliation and pain at the stocks:

Names	***Reason for being in the stocks***
John Waller	Robbery and Perjury
Ann Marrow	Fraud and same sex marriages (three)
Vere Street Coterie	Homosexual offences
Titus Oates	Perjury and the inventor of the Popish Plot

Crimes in the Middle Ages

Crimes in the middle ages ranged from theft to treason. Below are some crimes that were common in the Middle Ages.

Rebellion/ treason: This crime was punished by the accused been hung. Just before he died he/she would be drawn from the hangman's noose and quartered alive.

The biggest rebellions were: The Pilgrimage of Grace, 1536 and Kett's Rebellion, 1549.

Heresy. This was among the many crimes that attracted death. King Henry VIII became the head of the Church. To go against the king was not only a crime but also a sin. It was going against "God".

Vagrancy- A vagrant is a person, usually poor, who wanders from place to place without a home or regular work. In Medieval Europe this was considered a crime. From the 1530s this was punishable by getting whipped and from the 1540s it became punishable by hanging.

Smuggling- In the 1700s people smuggled in goods from abroad, e.g. Tobacco, Brandy, Tea and Silk. Why? Because the government had placed 'tariffs' on them.

Highway Robbers: Stagecoaches were a popular target as they usually carried people with lots of money and jewellery.

between 1300 – 1348

Crime Ratio during the Middle Ages

Theft 73.5% of all offences

Murder: 18.2%

Receiving stolen goods: 6.2%

Arson, counterfeiting coins, rape, treason and all others: 2.1%

Criminals were considered as people who disturbed the king's peace. If the crime committed was minor and insignificant, the lords had authority to punish the offenders in their local court house.

The sheriff/police were responsible for keeping the criminal under lock and key until their trial commenced. Criminals relied on family and friends to bring them food and other necessities. Otherwise, the accused would be starved to death.

The jail (goals) back in the Medieval era were dirty and filthy. If criminals were jailed for a long time, they would have died from disease and possible starvation.

Wrong-doings in Medieval ages were severely punished, crimes like stealing, murdering and treason were punishable by death. Lesser crimes, however, were punishable by fine and humiliation at the stocks.

Witches and Their Punishment

Witchcraft was forbidden in Medieval times, especially in England. Sorcery, however, was very popular and something had to be done about it. It made Medieval people feel uneasy especially since England and Europe were considered a Christian nation. Witches were seen as devilish, most natural disasters were blamed on them because people believed through "magic" spells the witches triggered the disaster.

The most common torture for a witch/sorcerer was to be burnt at the stake. Some other forms of torture included the witch was left naked, legs and arms spread out under the sun. This resulted in extremely bad sun burns. Another form of torture for witches was to be hanged.

The Crown

In the last chapter we have reviewed some of the salient features of the British constitution—the rule of law, the constitutional conventions, the wide gap between theory and practice, its antiquity and adaptability to modernisation and liberalisation. Now we proceed to study the system of Government as it is carried on from day-to-day. In this study, we shall first take up the Crown and the King.

Distinction between the King and the Crown

At the very outset, we are confronted with the distinction between the King and the Crown which Gladstone once pronounced the most vital fact in practice. "Who rules England?" asked a Stuart satirist. "The King rules England of course." "But who rules the King?" "The duke." "Who rules the duke?" "The devil." Nowadays, it is the Crown, not the King that governs England as the monarch's official acts are ruled by the advice of the Prime Minister, who is controlled in his turn by the House of Commons. In fact, the whole development of the British Constitution has been marked by a steady transfer of power from the King as a person to the Crown as an Institution of which King is the formal head. In early days, all the powers rested in the man who wore the crown, but in the course of history, these powers have been steadily transferred to the Kingly institution - the Crown. Two generations ago, Walter Bagehot wrote that Queen Victoria could disband the army, dismiss the navy, make peace by cession of Cornwall, begin a war for the conquest of Brittany, make every subject a peer, pardon all offenders and do other things too fearful to contemplate. Legally, the Queen can still enjoy all these powers. But today, all this is in theory. In actuality, these and other powers are performed not by the King as a person but by kingly institution termed as the Crown. The King, who performs these powers, is not the personal King, but rather the institutional King.

Therefore, the distinction between the King and the Crown is the distinction between the monarch as a person and monarchy as an institution. The King is the physical embodiment of the "Crown". King is a person, Crown is an institution. This distinction is well illustrated by the maxim, "The King is dead, long live the King." It merely implies that the person who occupies the throne may be dead but the institution of Kingship survives. The Crown is eternal, the King is mortal. The death of the King makes no difference in the powers and duties of the Crown. According to Blackstone, "*Henry, Edward, George may die but King survives them all." By King, Blackstone means kingly institution, i.e., the Crown. The Crown is an institution and so it never dies. The powers and functions of the Crown are not suspended by the death of the King, even for a single moment. Munro called the Crown, "an artificial and juristic person"* who is neither born nor ever dies.

The Crown, as Mr. Sydney Low says, is "*a convenient working hypothesis*". Sir Maurice Amos says, "The Crown is a bundle of sovereign powers, prerogatives and rights—a legal idea." Historically, the rights and powers of the Crown are the rights and powers of the King. In theory this is still the case. But in fact, these powers and rights are exercised not by the King personally but by ministers in the King's name who derive their authority from Parliament and are responsible to it. According to Dr Finer, "*When we talk of the actions of the Crown in politics we mean that the People, Parliament and the Cabinet have supplied the motive power through the formal arrangements established by centuries of constitutional development. The Crown is an ornamental cap over all these effective centre of political energy.*" In the words of Ogg, the Crown is a "subtle combination of sovereign Ministers (especially Cabinet members), and to a degree Parliament". It is a legal fiction. It is the institution to which all powers and privileges once possessed by the King have been transferred. The King is its physical embodiment, whereas the Cabinet is its "most concrete visible" embodiment.

Thus, the distinction between the Crown and the King centres round the following points:

(i) The King is a person, whereas the Crown is an institution. When the King becomes institutionalised, it is called the Crown.

(ii) The King is mortal, but the Crown is immortal. The death of the King does not mean the death of the Crown.

(iii) The King is only a part of the Crown; besides the King, the ministers and the Parliament also form parts of the Crown.

(iv) The King is only a person using the powers of the Crown.

All the powers of the State reside in the Crown. The Crown is the assemblage of sovereign powers.

We agree with Dr Munro who said, "*The Crown is an artificial or juristic person. It is an institution and it never dies. The powers, functions and prerogatives of the Crown are not suspended by the death of a King even for a single moment.*"

Succession to the Throne

In Anglo-Saxon days, the Kingship was elective. The "Witan" normally chose a person of superior repute and capacity from among the members of a single royal family, but there was no definite rule or order of inheritance during those days. Gradually however, Kingship became hereditary and by the thirteenth century, succession clung to the right to determine succession when the line was broken or when there was uncertainty or dispute. Today, succession to the throne is regulated by the Act of Settlement, 1701, which provided that in default of heirs to William III and of his expected successor, Anne, the Crown shall descend in perpetuity through the heirs of Princess Sophia of Hanover, who was a granddaughter of James I. The principle of heredity is determined by the rule of primogeniture, i.e., the elder in line being preferred to the younger and the male being preferred to a female. The heir must be a Protestant.

The succession to the throne is followed by a coronation but this ceremony has no legal significance. If the heir to the throne is a minor (under eighteen years of age) a regency is established to serve until the age of eighteen is attained. Regency also serves during any period when the monarch is prevented by any "infirmity of mind or body" which renders him incapable of performing the royal functions. It may also be added that the King may abdicate his throne, as Edward VIII did in 1936.

Powers of the Crown

The powers of the Crown are derived from two sources, i.e., prerogative and statute. Originally, the powers of the Crown were deemed to be "prerogatives" which inhered in the person of the King and were not conferred upon him by action of Parliament. Later, Parliament began stripping away the powers based upon prerogatives, while at the same time also bestowing new ones. Such powers which survived on the earlier basis constitute the prerogatives of the Crown. Thus, according to Dicey, the prerogatives are the residue of the discretionary or autocratic powers which have been left legally with the Crown. They denote the powers possessed without having been granted or conferred—powers acquired by prescription, confirmed by usage and accepted or tolerated even after Parliament gained authority to abolish or alter them at pleasure. These powers based on prerogatives form a very large part of the total powers of the Crown. Other powers of the Crown are derived from the acts of Parliament. The Parliament has not only cut down the powers of the Crown at certain points but has also added new powers. Thus, when Parliament authorises a new tax or imposes fresh duties of administration upon the Crown, it imperceptibly enlarges the volume of the powers of the Crown. However, the question as to whether a given power is derived from prerogative or from statute is of little practical importance. What is important to note is that the powers of the Crown are continually undergoing change—sometimes being curtailed and sometimes being carried to new heights. F W Maitland rightly said, "We must not confound the truth that the King's personal will has come to count for less and less with the falsehood ... that his legal powers have been diminished. On the contrary, of late years they have enormously increased."

The powers of the Crown may be considered under these heads:

(1) *Executive Powers:* The Crown is the executive. All executive authority is vested in it. It appoints all the high executive and administrative officers, judges, bishops, and the officers of the army, navy and air force; directs the work of administration; looks to the enforcement of all national laws; holds supreme command over the armed establishments; conducts the country's foreign relations; deals with the colonies and dominions and wields the power of pardon and reprieve. It can even declare war or peace; conclude a treaty without consulting Parliament. Thus, the Crown is the supreme executive authority and holds wide executive powers.

However, all these powers of the Crown are exercised by the ministers, or the Cabinet. The Cabinet and individual ministers are allowed a relatively free hand in the administration of the country. It is they who see that the laws are carried into effect. They decide who shall be appointed to office. They direct British foreign policy and conclude treaties. They even decide the issue of war. They spend the money that Parliament appropriates. In short, the ministers, and not the King, are the real wielders of authority. Even the higher officers of the royal household are appointed with the approval of the ministry. This shows the completeness of the control which the ministry exercises over the administration. Whenever the Parliament bestows powers on the Crown, it, in fact, delegates them to the Cabinet. To the King as an individual, the Parliament never grants any authority. The exercise of the prerogative of mercy is primarily a matter for the Home Secretary, and the royal share is merely formal. In the matter of bestowing public honours on his subjects, the King acts on the initiative and with the prior consent of his ministers. The Prime Minister and not the King is responsible to the Parliament for inclusions in and exclusions from the list of honours. Thus, it is clear that all the executive powers of the Crown are now put into action by the Prime Minister and his colleagues. The King is only a titular head and a symbol of final authority.

(2) *Legislative Powers:* The Crown is not only an executive but also an integral part of the national legislature. Technically, the law-making function is vested in the King-in-Parliament, which means the King acting in conjunction with the House of Lords and the House of Commons. But as in other things, so in law-making, the King has yielded to the Crown.

Theoretically, the King summons and prorogues the sessions of the British Parliament, dissolves the House of Commons, assents to the bills passed by the Parliament and issues Orders-in-Council. Likewise, no bill passed by the Parliament can become an act unless and until assented to by the King but once a bill is passed by the Parliament, the King does not exercise the right to veto. But all this he does on the advice of the Cabinet. Rather it is the Cabinet which exercises all these powers. The King has long lost the power of issuing decrees without the concurrence of Parliament. The Orders-in-Council which are still issued, are never promulgated save at the behest of ministers who owe their authority to the will of Parliament. The assent of the King to the acts passed by Parliament is never denied and is always given as a matter of course. This assent has never been withheld in the last, more than, two hundred years, and the whole ceremony by which it is extended is a picturesque formality. The King does not even read the bills. He has no responsibility because the bills would not have been passed, had the

King's ministers opposed them. So, when the ministers own the responsibility, why should the King reject them? The King's veto has fallen into disuse. Even if the Parliament were to send the King his own death warrant, he would not be able to resist his assent to it. In 1936, Edward VIII gave the royal assent to the acts of Parliament providing for his own abdication.

(3) *Judicial Powers:* It is said, "*The King is the fountain of justice*", a survival from the old far-off and forgotten days. In fact, the Crown does so as the King. The King appoints the judges, including the Justices of Peace in the counties and boroughs in name only. They are the nominees of the Cabinet—which is the part and parcel of the Crown. All issues which come before the Judicial Committee of the Privy'Council are decided by the Crown. All justice in England is rendered in the name of the King. Though theoretically the King exercises the prerogative of mercy and may grant pardon to persons convicted of criminal offences, yet actually this job is done by the Judicial Committee of the Privy Council. Munro opines, "*This is not a judicial power it is an executive power which the ministers control*".

(4) *Head of the Church:* Besides, the Crown is the *head of the British Church.* The archbishops, bishops, and other ecclesiastical officers are appointed by it. It is the final power in relation to ecclesiastical matters. The appointments are made on the advice of the ministers.

(5) *Fountain of Honour:* The Crown is the *fountain of honour.* Each year, a list of peerages and other honours like knighthood is prepared by the Prime Minister in consultation with the Cabinet. The Prime Minister is however, acquainted with the King's sensibilities in making up the list. He may add a name or strike off a name at the monarch's request. However, it is not obligatory for the Prime Minister to act according to the likes and dislikes of the King.

From the above description of the King's powers, it is clear that his powers are immense and important; but as remarked in the preceding pages, this is so only in theory. In practice, the powers of the King have been transferred to the ministers who actually exercise these powers and are responsible for the day-to-day administration of the country. As such the powers exercised by the king are actually exercised by the 'King Institution'-The Crown. The Crown includes all centers of authority viz. the Cabinet, the ministers and the Parliament. Whatever the Crown does, it has an ornamental cap on it- the King/Queen whosoever heads the State. It was this fact that led Sir Henry Maine to remark that "*The King of England reigns but does not rule*". The real custodians of the powers of the King are the ministers who direct every action of the King. Even the Parliament has assumed a subordinate position. The authority of the Cabinet is so pervading and real that Ramsay Muir was compelled to remark that the "Parliament is a tool in the hands of the Cabinet."

But it should not be presumed that the King has lost all authority and become a cipher. He is by no means without influence in the field of administration and legislation. He personally performs certain specific acts. He receives foreign ambassadors and on the opening of a Parliament, reads the speech from the throne. It is the duty of the Prime Minister to keep the King informed concerning the major policies which his Government proposes to execute and measures which his ministers propose to lay before Parliament and to obtain the King's opinion, if he has any. Bagehot rightly remarked that the King has three rights— "*The right to be consulted, the right to warn and the right to encourage*". The right to be consulted means that the Prime Minister should consult the King before taking an important decision on any public matter. The King may be more experienced than the Prime Minister. Besides, he is a non-party man. Therefore his advice, as it would be based upon rich experience, deep knowledge and an impartial observation, it is apt to be, a mature advice. But if the Prime Minister does not act upon the advice of the King, the latter has the right to warn the former. He may tell the Prime Minister, '*Whatever you think good, must be carried. Whatever you think good, has my full and effective support. But for one or the other reason you are wrong, I do not oppose nor is it my function to oppose but I warn.*' If the King feels that the policy of the Prime Minister is for public good, he may encourage him so that the Government may feel that it has the King's support and it may carry out that policy more effectively.

It may, thus, be concluded that, the influence of the royal opinion will, of course, depend upon charismatic personality, marked ability and personal image of the King and his cordial relations with the Prime Minister. Lowell has summed up the position of the King in these words, "*According to the earlier theory of the Constitution the ministers were the counsellors of the King. It was for them to advise and for him to decide. Now the parts are almost reversed. The King is consulted, but the ministers decide.*"

THE KING CAN DO NO WRONG

An important maxim on which the British constitutional structure rests is "*The King can do no wrong*". This maxim has three important implications:

Firstly, it means that the King is above law and cannot be tried in any court of England for any wrongful act done by him. For example, if the King commits any crime, there is no process known to English law by which he can be brought to trial. In short, this maxim ensures complete personal immunity to the King from the jurisdiction of ordinary courts of law. Secondly, the maxim means that the King is above all responsible for the acts done in his name. No person can plead the orders of the King in defence of any wrongful act by him. The King cannot authorise any person to do an illegal act. If any officer commits any crime under the orders of the King, it is the officer who will be held responsible and punished by the courts of England for such an offence. This point has been clarified in the Earl of Danby's case of 1679, who was impeached by the Parliament for "high treason and diverse high crimes and misdemeanours". Danby pleaded that whatever he had done was by order of the King. He even produced the royal pardon for the alleged offence. Parliament held Danby's plea illegal and void and laid down that "the minister cannot plead the command of the King to justify an unconstitutional act".

Back in the days of Charles II one of his courtiers wrote on the door of the royal bedchamber:

Here lies our sovereign lord the King.
Whose word no man relies on;
Who never says foolish thing,
Nor ever does a wise one.

This inscription truly represented the maxim, "The King can do no wrong" because Charles replied to this inscription that inasmuch as his sayings were his own, his acts were the acts of his ministers. The King assumes no responsibility for his participation in the administration of the country.

Thirdly, the maxim implies that for all intents and purposes it is the minister-in-charge who is legally responsible for every act of the British Government performed in the name of the King. This is why every order issued by the King is countersigned by the minister-in-charge who is politically responsible to the Parliament and is legally responsible to the courts of law. Without the counter-signature of the minister concerned, no law possesses any validity in England and, therefore, cannot be applied in any court. It is because of this fact that the speech, which the King delivers from the throne at the opening session of Parliament, is the handiwork of the Cabinet ministers. Even his tour programmes are decided by the Cabinet.

The Justification of Monarchy

Looking to the titular position of the King in England and his insignificant influence in the administration, a pertinent question often asked is, "Why retain the Kingship at all, if the authority of the Crown is no longer exercised by the King?" and "What good purpose is served by continuing with monarchy?"

It is, of course, true that the King has become powerless but it does not mean that he is devoid of influence. Monarchy is popularly acclaimed in England and is almost accepted by all political views. To quote Laski, "*Monarchy, to put it bluntly, has been sold to democracy as the symbol of itself, and so nearly universal has been the chorus of analogy which has accompanied the process of the sale that the rare voices of dissent have hardly been heard. It is not without significance that the official newspapers of the Trade Union Congress devote more space to news and pictures of the royal family than does any of its rivals.*" Although the Civil List, i.e., grant for the monarch and immediate members of the royal family amounted to five one hundredth of one per cent of the Budget, a fraction of one per cent yet little suggestion is made that the people fail to get their money's worth. Ceremony, pomp and ritual still connected with royalty are not necessarily against democracy, for, according to Jennings, "Democratic Government is not merely a matter of cold reason and prosaic policies. There must be some display of colour, and there is nothing more vivid than royal purple and imperial scarlet." In the seventies of the nineteenth century, England did see Republican Movement but the movement soon collapsed and Queen Victoria admonished Dile —the chief adherent of the Movement openly before including her in her Cabinet. Since then the Kingship has not faced any tempestuous storm which could shake its foundations. For the British "the Monarchy is a symbol of the enduring qualities of their race and living proof that whatever the future may bring it will not break too radically with the tried and proven concepts of the past." Let alone the Conservative Party, even the Labour Party has hardly felt any urge to abolish monarchy. Thus invariably British adore their sovereign. The reasons are not far to seek.

Royal Influence of the King

Though the King has long ceased to exercise the powers vested in him, it would be erroneous however, to conclude that he does not exercise influence on the Government. He still personally performs certain definite acts. He receives foreign ambassadors, reads the speech from the throne, assents to the election of a speaker by the House of Commons, dissolves the Parliament and selects the Prime Minister. These acts are so indispensable that if Kingship were to be abolished, some other provision would have to be made for performing them. An elected head of the state though a figure head would hardly be a better substitute as his acts though occasional may not be impartial and above suspicion. Hence, possibility of annoyance, friction and discord between the real head and constitutional head cannot be ruled out.

Moreover, the King because of his long continuity in office and the consequent experience he acquires thereof, can very well discharge the role of general counsellor. In the words of Bagehot, the King has three rights— the right to be consulted, the right to encourage and the right to warn. He maintains close touch with the Prime Minister who in consultation with the King often thrashes out a subject in hand before it is discussed in the Cabinet meeting. On several occasions, Queen Victoria wielded decisive influence upon public policies and measures, especially in connection with the conduct of foreign affairs. In 1869, she mediated effectively between the ministers and the lords on the question of disestablishing the Irish Church. In 1840, she practically prevented war between Great Britain and France. In 1884, she brought about a sensible settlement between the Conservative House of Lords and the Liberal House of Commons. Similarly, the advice of Edward VII was a factor of great importance in the shaping and execution of public policy. He is known to have encouraged the Holdane army reforms and to have sought to dissuade the House of Lords from rejecting the Lloyd George Budget of 1909. He was always accessible to the ministers with whom he enjoyed discussing public affairs in a direct and informal way. George V also played an active role in the nation's affairs, especially in connection with the Irish question and the struggle over the Parliamentary Act of 1911. Though the ministers need not follow the advice of the King, yet they will hardly disregard it. It is not only his exalted position that gives his advice weight, but also the fact of his broader knowledge, being on the throne for some time, and being above party politics that adds to the value of his advice. According to Jennings, "In some matters specially on foreign matters and those pertaining to the Commonwealth, the King has often more knowledge than the Prime Minister." Asquith opines that the ministers consider the advice of the King more respectfully than the advice from any other source. "*He is the umpire who sees that the great game of politics is played according to the rules.*" At times, the monarch may keep lips sealed for fear of being misunderstood or ignored. In 1986, Queen Elizabeth II was in fact unhappy over Thatcher's reluctance to apply sanctions against the racist minority Government of South Africa, yet the Queen avoided pressing the Prime Minister for accepting her views.

Leadership of the British Nation

In addition to the tangible services which the monarch performs and the influence he wields in Government, the King furnishes a leadership for British society. "In an age of lightning change," writes Ogg, "*it lends a -comfortable, even if* *merely psychological, sense of anchorage and stability; with the King in Buckingham Palace, people sleep more quietly in their beds.*" The visits of the King during the Second World War, to the various theatres of war and the bombed areas of England, had inspired the British to mobilise and fight heroically at the war fronts. "God save the King" is the national anthem. The monarch is a more personalised and attractive symbol of national integrity. The national anthem excites the soldiers who sacrifice their lives for the King. The British society, then, accepts the King as its head with pride and without any regression. "*If royalty had been found blocking the road to full control of public affairs by the people, it is inconceivable; the forces of tradition could have pulled it through.*"

King as Symbol of Commonwealth Unity

Besides, the King provides a symbol of imperial unity. He is the mysterious link, the magic link which unites loosely bound but strongly interwoven Commonwealth of nations, states and races. The King is the symbol of the free association of the members of the Commonwealth of Nations. Presently, the Queen as the head of the Commonwealth is a connecting link between England and nearly fifty other independent countries. Break this link furnished by royalty and all that is left of the union of autonomous partners in the Commonwealth disappears. Laski holds that "*Irrespective of their differences all the political parties agree that the Crown is an essential element of the imperial unity.*" If Kingship had not existed no dominion would have accepted the Prime Minister elected by the British as their head of State.

The British Parliament

The British Parliament has been called the "mother of Parliaments" whose progeny has spread into every civilised country. It is the oldest, largest, most powerful and most interesting of modern legislatures. Its influence has been worldwide. Now we turn our attention to this august Assembly of British intellectuals, statesmen, business magnates and popular leaders.

How the Parliament originated and developed into its present form has been explained in the foregoing lines. We need not repeat the whole history of its growth, but may draw the reader's attention to certain important facts of its growth which has been more or less spontaneous, slow and sometimes haphazard. It took eight centuries to transform the Parliament into a governing body elected on the basis of adult suffrage. All these eight centuries had been a period of struggle starting with King John who was made to sign on June 15, 1215 the Great Charter, and Magna Carta. Thereafter, the Parliament continued to struggle for substantial control of finance, legislation and administration. The

Revolution of 1688, established the sovereignty of the Parliament by reducing monarchy to a subservient position. With the first Reform Act of 1832, began the movement of making the House of Commons a popular chamber by extending suffrage. During the period 1832-1928, several electoral Reform Acts were passed which gradually granted every male and female of twenty-one (now reduced to eighteen) the right to vote, thus, completing the process of democratisation of Parliament.

Sovereignty of Parliament

If we study the history of the growth of Parliament one thing would become clear that in its struggle with the Kings, the Parliament finally emerged as the supreme authority over the country's affairs and ripened its strength by the eighteenth century. There are three important landmarks in the growth of the sovereignty of the Parliament. The first was when Parliament resolved in December, 1648 to bring King Charles I to trial who was subsequently executed in 1649. It was the same Parliament which abolished monarchy by an Act and declared England to be a Commonwealth. In 1660, the Parliament restored Charles II to the throne on the condition of his cooperation with it. The events of bringing Charles I to trial, abolishing monarchy and declaring England a Commonwealth, and then restoring monarchy clearly illustrate the sovereignty of the Parliament.

The second landmark was the Glorious Revolution of 1688, when James II was made to abdicate as he failed to cooperate with the Parliament. It was the same Parliament which invited William and Mary to the throne. Then in 1701, the Parliament passed the Act of Settlement which determined the order of the succession to the throne. The Act laid down not only who should reign next but also on what conditions he should reign.

The third landmark was in 1785, when younger Pitt became the Prime Minister and the King ceased to choose and dismiss his Ministers. The Cabinet system now became a naked reality and henceforth, Ministers came to be chosen and dismissed by Parliament.

These three landmarks in the history of the British Parliament illustrate that the Parliament is supreme and unlimited. It has gained substantial control over finance, legislation and administration. It can alter or rescind any charter, agreement or statute; it can cause any official of the Government to be dismissed and any judicial decision to be made of no effect. It can bend the Constitution in any direction it likes. It can levy any taxes and put an end to any usage and overturn any rule of common law. The power and jurisdiction of Parliament, says Sir Edward Coke, "is so transcendent and absolute as it cannot be confined either for persons or causes within any bounds". Blackstone, J A R Marriot and De Tocqueville also hold the same view. According to Blackstone, "The Parliament has the supreme and unlimited power to make all kinds of laws, to sanction them, to elaborate them and to interpret them. It can do all those acts which are possible." According to J A R Marriot, "*From every point of view, the British Parliament is the most peculiar and powerful institution. It is the oldest. Its jurisdiction is the widest and its powers are unlimited.*" **According to De Tocqueville,** "*The British Parliament has full powers to amend the Constitution. It is a legislative assembly and at the same time a constituent assembly too.*" De Lolme said that, "*Parliament can do everything but make woman a man and man a woman.*" Laski held 'The Parliament can do this also by enacting a law proclaiming change of sex'. However, before doing so the Parliament will have to accept its lunacy.

Dicey's Interpretation

Dicey has given an exhaustive description of the doctrine of the sovereignty of Parliament. He writes, "The sovereignty of Parliament is from a legal point of view the dominant characteristic of our political institutions ... It means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make and unmake any law whatever, and further no person or body is recognised by the law of England as having a right to override and set aside the legislation of Parliament." Thus, according to Dicey, the following are the main features of the doctrine of the sovereignty of Parliament:

(i) That there is no law which the Parliament cannot make.

(ii) That there is no law which the Parliament cannot unmake.

(iii) That there is no authority recognised by the law of England which can set aside the law of Parliament and declare such a law void.

(iv) That under the British Constitution there is no marked distinction between constitutional laws and ordinary laws.

(v) That the sovereignty of Parliament extends to every part of the King's dominions.

In brief, the Parliament can make any law it pleases. Every Act of the Parliament is constitutional. The courts have no power to declare any Parliamentary Act unconstitutional. If a measure is contrary to the Constitution as it has hitherto existed, the Constitution simply becomes something different in that regard. No one can allege that a particular Act of Parliament is *ultra vires.* The word of Parliament is law however, much it may cut across existing constitutional arrangements. The courts will enforce whatever law has been enacted by the Parliament. The only way of getting rid of it is to procure its repeal by another Parliament Act. Evidently the American practice of judicial review has not gained any foothold in England which still holds to the principle that whatever Parliament legislates is law and remains such until repealed by Parliament itself. The sovereignty of the Parliament is absolute in its negative and positive aspects.

To illustrate the sovereignty of Parliament, Dicey quoted the Act of Settlement, Acts of Union, Septennial Act and Acts of Indemnity. The Act of Settlement, 1701, made fundamental changes in the law of succession to the throne and debarred certain people from the throne who could succeed to it under certain conditions. The Septennial Act, 1716, extended the life of Parliament from three to seven years. This was a case of an existing Parliament extending its own life by four years. In 1936, the Parliament passed the Abdication Act and laid down that the King cannot marry against its will. By the Indemnity Acts passed from time to time, the Parliament legalised the Acts which were illegal at the time of commission.

Limitations on Parliamentary Sovereignty

The foregoing remarks about the sovereignty of Parliament may lead the students to wonder what protection the individual citizen in England has against infringement of his personal liberties and what is there to prevent Parliament from passing arbitrary acts? The age of royal despotism is gone but what about this new despotism of an omnipotent Parliament? Certainly the Parliament has legal power to make or unmake any law but a legal truth may be a political untruth. Jennings rightly pointed out, "*It cannot be said that it is dictatorship. At worst it is dictatorship for a term of years ... but dictators who at short intervals have to beg the people for their votes ... Parliament cannot govern. It can do no more than criticise.*" There are many moral and political checks which limit the sovereignty of Parliament.

(1) Moral Limitations

The first check is a moral check. The Parliament will not make any Act which violates the moral conscience of the British people. In fact, no legislature can even think of such legislation. Democracy is a Government by consent and no democratic Government should act against the moral will of the people. If it does, the people will take revenge.

It is true, as Dicey says, that law is law whether it is moral or not. It is law because it has been enacted by the Parliament. Moreover, the supremacy of Parliament is not mentioned in any constitutional document. It is the mere expression of custom, and carries with it the acquiescence of the people whose will is supreme and sovereign. We should not talk of legal fiction but of political truth and the political truth is that the British Parliament is bound in the exercise of its supremacy by the customs and moral codes of the people.

(2) Rule of Law

Another significant limitation on the legal supremacy of Parliament is the rule of law. We have already explained the concept of rule of law. The rule of law means that no authority can act arbitrarily and deprive the British citizens of their fundamental liberties. The rule of law is closely related to the supremacy of Parliament. To quote Barker, "Sovereignty of Parliament and Rule of Law are not merely parallel; they are also interconnected, and mutually inter-dependent. On the one hand, the judges uphold and sustain the sovereignty of Parliament which is the only maker of law that they recognise (except in so far as law is made, in the form of 'case law', by their own decision); on the other hand, Parliament upholds and sustains the rule of law and the authority of the judges, who are the only interpreters of the law made by Parliament and of the rest of the law of the land."

(3) Public Opinion

Dicey himself recognised the purely legal aspect of the doctrine of the sovereignty of Parliament and pointed out that this legal concept is operated within two limits, external and internal. The Parliament will not pass a law which will be opposed by the people and so is restrained externally from doing those Acts which will lead to mass opposition. Laski confirms, "*No Parliament should dare to disfranchise the Roman Catholics or to prohibit the existence of Trade Unions in Great Britain.*"

(4) Statute of Westminster

The Statute of Westminster, 1931, has also limited the sovereignty of Parliament, which *inter alia* provides that no Act of British Parliament passed after 1931, is to extend to a dominion unless the Act expressly affirms that the dominion concerned has requested and assented to it. Every dominion is completely independent to pass any law even though it may be against a law of England.

(5) International Law

Then there is the international law which has limited the jurisdiction of the Parliament. In West Rand Gold Mining Coy vs. The King, it was decided that international law is a part of the municipal law of the land and, therefore, the Parliament cannot enact any law repugnant to the principles and practices of international law.

(6) Judge-made Law

Judicial interpretations and judgments of the courts become precedents in due course and begin to be followed by the judges of the coming generations. Ultimately such decisions, known as judge-made laws, assume the shape of laws. Such laws are not changeable by the Parliament.

(7) Delegated Legislation

This is another inroad on the sovereignty of Parliament. The Parliament being overburdened with work and also holding sessions for less than half a year permits other bodies to share in law-making. The Orders-in-Council issued to meet emergencies during the absence of Parliament have the force of laws.

The fact, therefore, is that although at first glance, the Parliament may seem to enjoy unlimited powers in law, but in practice it is bound by tradition, international law, Statute of Westminster and public opinion. Ultimately, the legal sovereign derives its authority from the political sovereign, the people. Evidently, the ultimate sovereignty in England lies with the people. Thus, in today's practical politics, parliamentary sovereignty is a political myth. It remains only a representative avenue of debate rather than controller of the governance of country.

THE HOUSE OF COMMONS (HOC)

The House of Commons, says Sydney Low, "is the most remarkable public meeting in the world. Its venerable antiquity, its inspiring history, its splendid traditions, its youthful spirit and energy, the unrivalled influence it has exercised as the model of Parliament, its inseparableness with the vitality of English nation, its place as the visible centre and the working motor of our Constitution, all this gives it a unique place." Of the two Houses of the Parliament, the House of Commons is indeed the most important and powerful chamber. "When," once wrote Spencer Walpole, "a Minister consults Parliament, he consults the House of Commons; when the Queen dissolves Parliament, she dissolves the House of Commons. A new Parliament is simply a new House of Commons." So, we shall begin our study of the Parliament with the House of Commons not only because of its primacy but also because the position, functions and problems of the second chamber, the House of Lords, cannot be properly understood until we understand the nature of the House of Commons.

Organisation

The House of Commons is purely an elective body and it has always been so. In earlier times, it included the spokesmen of the landholders, merchants and guildmen and so it continued until hardly more than a hundred years ago. Then in the course of the nineteenth and twentieth centuries, parliamentary suffrage was by stages extended to the general mass of the people and the House of Commons became a popular chamber in the real sense of the term. The electorate became numerous and heterogeneous and the functional groups were replaced by territorial groups.

The membership of the House is raised after every ten-yearly census. Thus, it was raised from six hundred and thirty to six hundred and thirty-five in 1974, and then to six hundred and fifty in 1983. The House of Commons till 1992 election, consisted of six hundred and fifty members—five hundred and twenty-three from England, thirty-eight from Wales, seventy-two from Scotland and seventeen from Northern Ireland. In the April, 1992 elections, the House of Commons consisted of six hundred and fifty-one members. In the May, 1997 and June, 2001 elections, the House consisted of six hundred and fifty-nine members. In May, 2005 General Elections, the House of Commons consisted of 645 members. They are now elected from single-member constituencies arranged on a geographical basis. The average number of voters in a constituency is 75,000. The constituencies are in all cases counties, boroughs or sub-divisions thereof. The constituencies do not cut across county or borough boundaries. They are commonly contained wholly within a single county or borough. Every constituency has a distinct name, e.g., the borough of Bradford, the Central Division of Portsmouth. The delimitation of constituencies takes place upon each general election. There are as many single membered constituencies as there are seats in the House of Commons. Every man and woman of the age of eighteen or above is now entitled to vote. Minors, criminals, idiots, aliens, bankrupts and lunatics are excluded from suffrage. All British subjects of either sex who are of age are eligible for election, provided they are not minors and lunatics, bankrupts and criminals. Clergymen of the three historic churches, peers of England, Scotland and Wales or persons holding contracts from the Government and holders of office under the Crown are debarred from seeking election. In short, every person, man or woman, who is of eighteen years of age and is not otherwise disqualified, may cast a vote and seek election after attaining the age of twenty-one. He can contest from any constituency.

According to the National Statistics Agency 44.9 million out of total population of 59.6 million are the voters. In 1997, 71.6 per cent exercised vote. In June, 2001 turnout of voters was 59.8%. It may be pointed out that in 1997 elections, the Labour had the lead of 179 seats whereas in 2001, it was reduced to 165 (15 seats of Northern Ireland not included).

POWERS AND FUNCTIONS OF THE HOUSE OF COMMONS

The House of Commons is the most important organ of the British Government. At present, it enjoys the highest powers in the legislative, financial and executive fields of the administration of England. Since 1911, the House of Commons has assumed final powers of law-making which are actually shared with the House of Lords. As we have said earlier, the House of Commons is the Parliament. "When a Minister consults Parliament, he consults the House of Commons; when the Queen dissolves Parliament, she dissolves the House of Commons." This is merely an epigrammatic way of saying that the leadership, power and prestige of the House of Commons are such that for many purposes, Parliament and the House of Commons are one and the same thing. The main functions and powers of the House of Commons may be explained as under:

(1) Legislative Functions

England has a unitary form of Government and there is only one legislature, one executive and one judiciary for the whole of the land. The House of Commons being the popular chamber enjoys vast powers in the field of law-making. As we have seen in our study of parliamentary sovereignty, there is no law which the House of Commons cannot pass. Formerly, its powers of law-making were coordinate with those of the House of Lords, but the Parliament Act of 1911, as amended in 1949, has greatly curtailed the powers of the Lords and has made the latter subordinate to the Commons. Now the final word regarding all legislative work of the Government lies with the House of Commons; it enjoys supreme authority in the field of law-making. Though it, by itself, can do nothing as the laws are made by the King, Lords and Commons yet the powers of the Lords and the King are subject to significant limitations. The House of Lords can not delay a non-money bill for more than a year and the King cannot withhold his consent. Thereby, not only the initiative but also the decision with regard to all non-money bills has now been left to the House of Commons. Its power over legislation is thus very significant.

(2) Financial Powers

The House of Commons wields great authority over the nation's purse. It was through the control of the nation's purse that the House of Commons rose to supremacy. According to the Act of 1911, all money bills must originate in the House of Commons. The powers of the House of Lords over the money bills are very much limited. At the most, it can delay the money bill for one month. If during this period, the Lords do not pass the bill, the House of Commons sends it to the King which becomes an Act on receiving his assent. Obviously, the power of the House of Commons over money bills is complete and decisive.

In addition to it, the House of Commons exercises a great control over the finances of the Government. It discusses and then passes the budget. The Lords are not empowered to override the bill of the House of Commons which is the final authority to sanction all expenditure and taxes. In short, the House of Commons must put its final seal before any taxes can be raised and expenditure is made.

(3) Control over the Executive

The third great function of the House of Commons is to control the executive. England has a parliamentary form of Government and so the executive is responsible to the popular chamber of Parliament. The Council of Ministers can remain in office so long as it enjoys the confidence of the House and it must resign whenever the policy of Government proves fundamentally unacceptable to the House. Therefore, "an obligation rests upon the House of Commons to exercise a day-to-day control over the ministry in such a way that fundamental disagreement between the executive and the representatives of the people will be clear and manifest". The House of Commons maintains its control in two ways: (i) by seeking information about the actions of Government, and (ii) by criticism.

The members of the House of Commons can put questions to the Government which the Ministers are obliged to reply. At the commencement of the sitting of the House, one hour, four days in a week, is devoted to answering questions by the Ministers which have been put to them. It is called the "Question Hour." The purpose of putting questions is mostly to bring the work of the various departments under public scrutiny. The number of questions put to the Ministers at every session runs nowadays into thousands; and question hour is an interesting portion of every daily sitting. It is the most effective check on the day-to-day administration. As an English authority testifies, "There is no more valuable safeguard against maladministration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of the executive Government and its subordinates. A Minister has to be constantly asking himself not merely whether his proceedings and the proceedings of those for whom he is responsible are legally or technically defensible, but what kind of answer he can give if questioned about them in the House, and how that answer will be received." *The device helps greatly,* as Lowell observes, "*not only to keep* *administration up to the mark, but to prevent growth of a bureaucratic arrogance which happily is as yet almost unknown in England* ". The House of Commons is not only a lawmaking body but is also a debating assembly. The most important function of His/Her Majesty's opposition is to criticise administration and policy-making. The best opportunity for the opposition to criticise the Governmental policy as a whole is when the House debates the reply to the king's speech. Then the opposition criticises the Government's policy and puts the ministry on the defensive which has to reply to the criticism of the opposition and defend the Government's policy.

Again a member may move a motion of censure or motion of general want of confidence in the ministry. Motion for censure is usually aimed at an individual Minister. But the criticism of an individual Minister under the theory of collective responsibility amounts to the criticism of the whole ministry. Then there may be moved a motion of general want of confidence in the Government. This is an extreme procedure, but it is sometimes resorted to. The House of Commons, therefore, possesses wide opportunities for control of the executive. That such control is needed is clear because the executive has extended its functions to the extent that they touch the very bones of individual lives. Finer remarks, "*The Government departments are virtually forty great monopolies; they need a strong force outside them to shake them up.*"

Law-making Procedure

In the early stages of its history, it may be recalled, the House of Commons had no power to make laws. It merely petitioned the Crown to make laws who then framed and enacted laws at its own discretion based upon the petitions of the House. Sometimes the laws made by the Crown turned out to be very different from what had been asked for. This led to a demand by the House of Commons for a share in law-making. Gradually the demand was yielded to until at last, by the fifteenth century, the two Houses became full-fledged legislative bodies and developed a Parliamentary procedure of law-making, giving each bill three readings, referring it to a Committee, and voting it and sending it to the King for his assent.

Before we describe the existing procedure of law-making in England, we may just refer to the various kinds of bills that appear before the House. Bills are usually divided into public bills and private bills. Public bills are of general application and pertain to the whole public and to the larger parts of the kingdom. On the other hand, private bills are of local or private interest which concerns a specific person, corporation, group or local area. In other words, they are not of public concern. Public bills may be sub-divided into Government bills and private members' bills. A Government bill is one which is introduced on behalf of the Government by a Minister. A private member's bill is introduced by a member of the House who is not a member of the Government. Public bills may be either money or non-money bills. First we shall describe the procedure of public non-money bills.

The British Parliament: House of Lords

The House of Lords is the oldest second chamber in the world. It has been in continuous existence in one form or another for more than a thousand years. It grew out of the Great Council which was the successor of the Saxon Witan. In 1295, when Edward I called his model Parliament, all the different classes of people summoned to attend met in one single assembly. But afterwards, they split up into three groups—nobles, clergy and commons. Later on the greater clergy found its interests in common with the nobles and they associated together into one body which came to be called the House of Lords.

Composition of the House of Lords

The membership of the House of Lords is not fixed. Formerly these members used to fall into seven distinct categories:

(1) Princes of the royal blood;

(2) Hereditary peers;

(3) Representative peers of Scotland;

(4) Representative peers of Ireland;

(5) Lords of Appeal;

(6) Lords Spiritual;

(7) Life peers.

(1)Princes of the Royal Blood

In this category were included all such male members of the royal family who attained maturity and were within specified degrees of relationship and were conferred the title of Duke. The eldest son is Duke of Cornwall and second son Duke of York. If another son was born, he was entitled as Duke and made a member of House of Lords. Such members were rarely two or three at a given time. Their membership had little practical importance because the princes did not attend the sittings of the House of Lords except on rare occasions.

(2) Hereditary Peers

This category consists of the largest number of members. About nine-tenths of the members belong to this category. A great majority of people held their seats in the Lords because they per chance they happened to be the eldest grandsons of an ancestor who was first created a peer. They were portrayed as "accident of an accident", by Bagehot. There was no limit to the number in this category. The power of the Crown to create peers was unlimited and as many people could be created peers as the sovereign liked. Certain classes of persons have been however, ineligible for peerage. These are: (1) persons under eighteen years of age; (2) aliens; (3) bankrupts; (4) persons serving a sentence on conviction of felony or treason; and (5) women. However, since 1963, peeresses have been given the right to sit in the House of Lords. If a peer dies leaving no son, the eldest daughter could inherit the peerage and a seat in the House of Lords.

(3) Representative Peers of Scotland

Their number was sixteen and were elected by the Scottish peers in accordance with the provisions of the Treaty of Union, 1707, until 1963. The Peerage Act of 1963, did away with the election and all Scottish peers began to be admitted to the House on hereditary basis.

(4) Representative Peers of Ireland

A fourth group was of the Irish representative peers. By the Act of Union of Great Britain and Ireland 1801, Irish peers were entitled to elect twenty-eight representatives, but since 1922, when Ireland was declared a free state, no new peers were to be created. Consequently, the number of Irish representatives dwindled and now not a single Irish peer remains as the member of the House of Lords. It is thus extinct.

(5) Lords of Appeal in Ordinary (Law Lords)

In this category, there were nine law lords for a pretty long time. Their number has been fluctuating. They are appointed by the Crown under the provisions of the Appellate Jurisdiction Act, 1876, to assist the House in the performance of its judicial functions. They hold their seats for life. They were chosen from among distinguished jurists. Presently there are 12 law lords.

(6) Lords Spiritual

They are twenty-six in number. Two are archbishops of York and Canterbury and twenty-four are senior bishops of the Church of England. Out of twenty-four, bishops of London, Durhem and Winchester are positively there according to seniority. When a sitting bishop dies or resigns, the one next on the list, in the order of seniority, becomes the member.

Their member remained 26. **As per Wikipedia information in** 2009 **the position was-**

Total Lords: 738

Hereditary - 92
Spiritual Lords - 26
Life Peers - 609
Leave of Absence - 11

(7) Life Peers

They are created under the provisions of the Life Peerages Act, 1958. They are the persons who have held high offices in the State and have since retired, e.g., Ministers, Speakers, etc., Their successors are ***not ipso facto*** entitled to the membership of the House of Lords. Most of them are active participants in the business of the House and four are women peers since 1958. Out of 746 peers, 615 are the life peers at present. Thus, at present, the total number of the members House of Lords is 746.

In the composition of the House of Lords, it may be noted that it is partly hereditary and partly democratic. Till 1957, the membership of the House of Lords was entirely male. But since 1958, women were allowed admission to the House if they were created life peeresses. Its composition prompted Munro to call the House of Lords as "*Westminster Abbey of living celebrities.*"

The Latest Composition

As per Press report the members who sit in the House of Lords can be divided in four categories:

(a) About 746 peers of whom 616 have been appointed for life.
(b) There are 92 hereditary lords.
(c) There are 26 Bishops and Archbishops.
(d) There are 12 LawLords.

It will not be out of place to point out that until year 2000, life peers used to be appointed as part of the Queen's New Year and Birthday Honours. With the inception of House Lords Appointment Commission this generally happens now at other times of the year.

It may not be out of place to point out that since 1971, each Lord was entitled to "f 8.82 per day for attending session. Law Lords got regular salary.

Lord Chancellor

The Lord Chancellor is the presiding officer of the House of Lords who sits on a large couch or ***diwan*** known as the woolsack. He is a member of the Cabinet. He is appointed by the Queen on the advice of the Prime Minister and holds office during the pleasure of the Crown which means the Prime Minister. His powers as presiding officer are insignificant as compared with those of the Speaker. He does not even enjoy the powers commonly enjoyed by the chairmen of the Standing Committees. He does not even have the power to recognise members who wish to speak. If two or more members rise simultaneously to speak, the House and not the Lord Chancellor decides who shall have the floor. He does not even have the common disciplinary powers. The proceedings of the House are orderly but if order in the House is to be enforced, it is done by the House itself. The members do not address the chair but the House as "My Lords." The Lord Chancellor does not even have a casting vote, though as a peer he may speak and vote. In a word, his role as presiding officer is almost entirely formal.

It will not be out place to point out that since July 4, 2006 through an ordinance, the office of the Lord Chancellor has been abolished. He has been substituted by Lord Chief Justice.

Functions of Lord Chancellor (now Lord Chief Justice)

The Lord Chancellor is also the Chairman of the Judicial Committee and the legal adviser to the Crown. As such, he enjoys the following powers:

(i) The judges of the High Courts are appointed by the Crown on his recommendation.

(ii) He appoints the judges of the County Courts and also has the responsibility for the appointment of Justices of Peace.

(iii) He can remove the judges of the County Courts and Justices of Peace.

(iv) He holds the great seal of the Realm which he affixes on behalf of the Crown on all agreements, declarations and treaties.

(v) He presides over the House when it sits as the highest Court of Appeal.

(vi) He is the Chairman of the Council.

(vii) He controls and supervises the organisation of judiciary under the Act of 1925.

(viii) He presides over the joint session of the Parliament in House of Lords when the ruling monarch presents his/her address.

Committee System

The Committee system in the House of Lords is broadly similar to that found in the House of Commons, and hence, need not be described in detail. Besides the Committee of the Whole House, large use is made of Sessional and Selected Committees; and there is a Standing Committee for textual revision made up at the beginning of each session, to which every bill, after passing through the Committee of the Whole, is referred, unless the House otherwise directs. The most important Sessional Committees are: (1) the Committee of Privileges; (2) the Appeal Committee; (3) the Standing Orders Committee; and (4) the Committee of Selection.

Powers and Functions of the House of Lords

Before the passage of the Parliament Act of 1911, the House of Lords was in all respects coordinate in powers with the House of Commons. In legislation, the Lords were on a footing of perfect equality with the Commons. Any bill could originate in either of the two Houses and no bill could become a law unless passed by both the Houses in the same form. In financial matters, there was a well-established convention that the money bill could not originate in the House of Lords but it could reject or amend such a bill. In judicial matters, the House of Lords had both appellate and original jurisdiction. It acted as the highest court of appeal for the United Kingdom and besides that it had the power to try the cases of its own members if they refused to be tried by the ordinary courts. Finally, it had the power to hear impeachment cases brought by the House of Commons against the high officials of the State. It may however, be noted that trial of Lords and impeachment of officers has now fallen into disuse.

THE PARLIAMENT ACT OF 1911 AND ECLIPSE OF POWER OF LORDS

Before the passage of Act of 1911, the House of Lords had co-equal and coordinate powers with the House of Commons.

After the passage of Parliament Act of 1911, the position underwent a change and the House of Lords was reduced to a mere shadow of its former self. This Act sealed the victory of the House of Commons statutorily. In order to understand the Act of 1911 properly, we would briefly trace the history of the relations between the Commons and the Lords and state the necessity of the Act. Before 1832, the relations between the two chambers were quite cordial because the predominant elements in both the Houses were Conservative and many members of the House of Commons were personal defendants of the House of Lords. But a great change came with the Reform Acts of 1832, 1867 and 1884 whereby the House of Commons became democratic. Now it became evident that a conflict between the two Houses was inevitable, sooner or later. So long as the Conservatives were in power in both the houses, there was harmony but when the Liberals obtained majority in the House of Commons, they had to reckon an entirely hostile House of Lords. During the Liberal administration of 1892-1905, the House of Lords rejected Gladstone's second Home Rule bill and defeated or mutilated several other measures. Gladstone said that the differences between the two Houses were fundamental. The Liberals declared that the House of Lords must be mended or ended.

The climax came in 1909, when the House of Lords rejected the finance bill of that year. Lloyd George had introduced a budget which proposed certain taxes particularly affecting adversely the landed aristocrats. The Liberal party popularised it as the people's budget. Upon its rejection, an uproar was raised in the House of Commons that this action of the House of Lords was unconstitutional. In fact, a resolution was passed to the effect by the Commons but the Lords did not yield. Then the Liberal party appealed to the country and was returned to the House of Commons with a still greater majority. In April, 1910 the Liberal Government introduced the bill to curtail the powers of the Lords. It was very unlikely that the House of Lords would pass the suicidal bill. The Government threatened that in case of rejection they could use the old procedure of swamping the House of Lords by creation of a sufficient number of new peers. The House of Lords dared not reject the bill but delayed it. Again a general election took place over the same issue and again the Liberals came victorious at the hustings. The bill was reintroduced and the Lords gave way under the threat of being swamped. Thus, the bill, after a long battle, won the victory and became the famous Parliamentary Act of 1911.

Provisions of 1911 Act

The main provisions of the Act are the following:

(i) If a money bill having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is sent up to that House, the bill shall, unless the House of Commons directs to the contrary, be presented to His Majesty and become an Act of Parliament on the royal assent being signified, notwithstanding that the House of Lords have not assented to the bill.

(ii) If any public bill (other than a money bill or a bill to extend the maximum duration of Parliament) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not) and having been sent up to the House at least one month before the end of the session, is rejected by the House of Lords in each of these sessions, the bill shall on its rejection for the third time by the House of Lords, unless the House of Commons directs to the contrary, be presented to His Majesty and become an Act of Parliament on the royal assent being signified thereto, notwithstanding that the House of Lords have not consented to the bill; provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of these sessions of the bill in the House of Commons and the date on which it passes in the House of Commons in the third of these sessions.

The general effect of the Parliament Act of 1911, was to terminate the coordinate and independent authority which the House of Lords had enjoyed before. Under this Act, a money bill can be presented to the King for his assent even if the Lords do not accord their assent to it, provided it was sent to the House of Lords one month before the end of its session. In the case of non-money bills, if such a bill is passed three times by the Commons in successive sessions and each time, it is rejected by the Lords, it may be presented to the King for his assent provided two years have elapsed between the initial proceeding of the bill and its final passage in that House in the third session. It may also be mentioned that the Act reduced the life of Parliament from seven to five years.

Act of 1949

Though the Parliament Act of 1911, greatly curtailed the authority of the House of Lords, yet to further curb its authority, an Amending Act was passed in 1949, which reduced the period of two years to one year and the number of sessions from three to two. Now the position is that a bill may become an Act despite its having been rejected by the House of Lords if it has been passed by the House of Commons in two successive sessions (instead of three as provided in the Act of 1911), and if one year (instead of two) has elapsed between the date of the second reading in the first session in the House of Commons and the final date on which the bill is passed by the House of Commons for the second time.

Powers of House of Lords after the enactment of 1911 *and* 1949 *Acts.* After having studied the Parliament Act of 1911 as amended in 1949 we may briefly enumerate the powers of the House of Lords as at present:

(i) *Legislative Powers:* Legislative powers can be discussed in two phases— control over money bills and non-money bills. As regards control over financial bills, the House of Lords is practically ineffective. If the House of Lords withholds its assent to money bill for more than a month, it would be presented to the King and become a law on receiving the royal assent despite the fact that the Lords did not concur with it. In other words, a money bill can be delayed by the House of Lords for only one month. The money bills cannot be even introduced in the House of Lords. Thus it no longer exercises control over the purse.

So far as non-money bills are concerned the same may be introduced in the Lords but usually ninety per cent bills are introduced in the Commons. A non-money bill passed by the House of Commons in two successive sessions with an interval of at least one year between its first reading in the first session and its last reading in the second session will become a law after having received the royal assent irrespective of its having been rejected by the Lords. In other words, a non money bill can be delayed by the House of Lords for a period of one year only. **Thus, in both the financial and non-financial fields the final authority rests with the Commons and the House of Lords has now lost all its effectiveness in these fields.**

(ii) *Executive Powers:* The Lords have the power to ask questions from the Government and have a full right to debate its policies. It enjoys a share in the Cabinet membership. Some Lords are included in the Cabinet. It may be noted that the Lords have no power to pass a censure against the Ministry. The Cabinet is not responsible to the House of Lords. The latter can only cross-examine the Ministers but not oust them.

(iii) *Judicial Powers:* The House of Lords enjoys original powers to try peers in case they are involved in any treason or felony against national interest. It is also authorised to hear impeachments sent to it by the House of Commons. But nowadays this original jurisdiction has lost all its importance.

The House of Lords also acts as the highest Court of Appeal in Great Britain. So far as theory is concerned, the ordinary members have the right to attend the meetings of the House at the time of trial and can decide the judgment by a division of vote but actually they never do so. At present only the 12 Law Lords hear appeals. The whole House never meets as a Court of Appeal.

From the above accounts of the present powers of the House of Lords, it is evident that it has become a shadow of its former self. What it was already in actual practice, it has also become so in theory and law. It is now not only a second chamber but for all intents and purposes has been reduced to a secondary chamber. Even all possible allowance being made, it is nowadays possible both actually and legally for legislation of every description to be enacted without the assent of the House of Lords. Thus it has been reduced to a mere glamorous upper chamber. Hence, Dr Munro described the House of Lords as ***"Westminster Abbey of living celebrities."*** The top ranking politicians, sagacious statesmen having no interest in active politics and otherwise leading a retired life and almost aged found place in the House of Lords. Hence, the above remarks of Dr Munro are fully justified.

The House of Lords—an analytical appraisal

The House of Lords as presently constituted has been the subject of severe criticism. The criticism runs chiefly on three lines—1) its predominantly hereditary character; 2) its association with certain groups and interests; and 3) its having become wedded to the principles and policies of the Conservative Party. Briefly considered, these criticisms run as follows:

(1) Political Anachronism

The House of Lords has been called a 'political anachronism' in a land of democracy. The House cannot be called popular in any sense of the term. While during the nineteenth and twentieth centuries, the House of Commons underwent the process of democratisation, the House of Lords stood still. It remained inherently a hereditary body representing mainly the interests of landed property and the established order. It identified itself with all those forces that tended to perpetuate aristocracy. By standing still while other institutions became progressively democratised, the House of Lords became more and more an assembly of men who are lawmakers by mere accident of birth. The peers are responsible to nobody except themselves. Webbs has aptly remarked, "*Its (House of Lords) decisions are vitiated by its composition.*"

(2) Fortress of Wealth

Secondly, the House of Lords represents the interests only of the landed aristocracy. In the words of Ramsay Muir it is the 'fortress of wealth'. In fact, property is the basis of the House of Lords. "Over one-third of them are directors (some multiple) of the staple industries of the nation. One-third of them also run very large estates. Many of them are related by marriage, birth and business connections with the conservative members of the House of Commons." Naturally therefore, it looks to the interests only of the higher classes. Hence, Webbs calls it "*the worst representative assembly ever created*". Another writer has called it "the directory of Directors". According to Laski, there is no large industry where capitalist leaders do not have representation in this House. Lord Acton wrote to Gladstone's daughter in 1881 when the Lord opposed the Irish Land bill, "But a Corporation according to a profound saying has neither body to kick nor soul to save. The principle of self-interest is sure to tell upon it. The House of Lords feels a stronger duty towards its eldest sons than towards the masses of ignorant, vulgar and greedy people. Therefore, except under very perceptible pressure, it always resists measures aimed at doing good to the poor. It has almost always been in the wrong—sometimes from the prejudice and fear and miscalculation, still often from instinct and self-preservation."

(3) Bipartisan

Thirdly, the House of Lords has converted itself into a bipartisan body composed of men of a single political party. After 1886, the House of Lords has remained overwhelmingly conservative. Thus, the Conservative Party remains in unchallenged mastery of the House of Lords. No bill promoted by a Conservative Government has been rejected by the House of Lords since 1832, and "for the last fifty years at least, no Conservative bill has been amended against firm Government opposition". According to Laski, "It is not an impartial useful institution which goes by public opinion. It has always supported the interest of only one party. The Conservative Party may be in power or not, but in the House of Lords it has always been in majority."

(4)Irregular Attendance

Fourthly, the thin attendance in the House of Lords has also given a cause of complaint to its critics. Normally, only eighty or ninety peers participate in decisions of the House of Lords. Some peers seldom show their faces in the

House. One-half of its members have never spoken at all and about one hundred peers have not taken the oath as yet. Some peers are not even recognised by the servants of the House. The quorum for conduct of ordinary business is only three. In the words of Lord Samuel, the House of Lords is *"the only institution in the world which was kept efficient by the consistence of the absenteeism of the great majority of its members"*.

CHAPTER 25

CONSTITUTION OF USA, BACKGROUND, SALIENT FEATURES

Introduction

The American political system, now over two hundred years old, a respectable age, is apt to give the United States a just claim to Government maturity. The political institutions evolved through the wisdom of the founding fathers and the experiences of older nations have plainly withstood the test of time. The American system of Government is largely a homemade product. It is not something planned and created in accordance with an ideology as totalitarian Governments are but a continually changing organism which has been matured by the unending process of trial, error and correction. It holds a singular interest because upon it have played most of those historical factors and forces which have moulded the history of the world such as imperialism, nationalism, industrialism and democracy. It is here that the philosophy of John Locke, which was propounded to stabilise the Glorious Revolution, became the basis of another memorable revolution against the tyranny of Englishmen themselves. It is here that the celebrated doctrine of 'Separation of Powers' expounded by Montesquieu was for the first time accepted and strictly adhered to. It is here that the concept of 'Union without Unity' (of federation) was for the first time mooted and proved practicable. Most of the countries of the world which chose a federal form of Government have drawn inspiration from the Constitution of the United States of America.

Land and the People

The area of the United States of America is 3,022,387 square miles. It occupies about one-nineteenth of the land surface of the globe. It lies in the temperate zone of the North American continent, stretching 3,000 miles from the Atlantic Ocean on its East, to the Pacific Ocean on its West. On the North, it is bordered by Canada and on the South, by Mexico. It has several mountains, some of which rise to an altitude of more than 13,000 feet. It has eight prominent rivers which make the land very fertile. The five great lakes, forming part of the boundary between the United States and Canada, comprise the largest island of fresh water in the world.

Nearly two per cent of the population of USA consists of Negroes. About two-thirds of the people live in towns and cities and nearly one-third in the rural areas. The population shows certain peculiar trends in the USA. There is a slight preponderance of women over men. The population of the towns is now on the increase and the people are drifting towards the west coast of the country.

Production and Industry

Nature has been kind to the United States. She is rich in mineral resources. Coal, iron,, copper, lead, zinc, silver, gold and mercury are found in abundance. Petroleum is also found in large quantities. The principal crops produced in the USA are wheat, oats, barley, potatoes, cotton, sugarcane and tobacco. Forest land occupies about one-third of the United States.

The United States of America is a highly advanced info-tech industrial country. The principal industries are motor vehicles, steel works, meat packing, petroleum, chemicals, liquor, paints and industrial apparatus. She exports automobiles, aircraft, coal, cotton, iron and steel products. She imports beverages, watches and clocks, coffee and jute products, etc.

Immigration has helped America to become the richest country. Each year, a million people enter America. Had it not been for this immigration, America would have grounded itself to a halt.

Education

The percentage of literacy is very high in America. Over ninety-nine per cent of the people are literate. Free schools are established. They are financially supported by the states. Education up to the age of sixteen years is compulsory both for boys and girls. Harvard, Chicago, Yale and Columbia are the leading universities. The Americans also take part in sports; popular sports being tennis, skating and swimming.

Religion

Religion gets voluntary support from the people. The Government gives no aid to the churches. The early settlers of America had suffered at the hands of religious fanatics. They knew very well the importance of separation of the Church from the State. Hence, the separation of the Church from the State is a cardinal principle of the US Government. The principal religious organisations are Protestants, the Roman Catholics and the Jews. The freedom to worship according to one's own conscience is protected by the Constitution.

Constitutional Development

The study of the history of the Constitution of the United States of America shows how the form of the Constitution is moulded by the exigencies of time. It was the peculiar set-up of the thirteen colonies which led to the evolution of the Federation. These colonies, situated on the Atlantic side largely peopled by English settlers, were of three different classes. Firstly, there were Crown Colonies each of which was ruled by a Governor appointed by the British King. He was assisted by a Council in the conduct of the administration. The second class of colonies was called the Proprietary Colonies. These colonies were under individuals who had been given the right to exercise the powers of Government. Lastly, there were the Charter Colonies in which the powers of Government were conferred directly upon the free men of the colony.

Apparently these colonies had a variety of governments but all were alike fundamentally in their love of civil liberty and their adherence to the institutions of Free Government. During the early part of the eighteenth century, the colonies had acquired a large measure of Self-Government. The colonial Assemblies, elected by the people, had the right to initiate legislation. They managed local trade, police and had the right of taxation to meet the local needs. The mother country however, controlled and regulated foreign trade, that also to her own advantage. The mother country controlled foreign affairs, navy and army and decided questions concerning war and peace. This was resented by the colonies. Naturally, the conflict between the colonies and the mother country ensued. The colonists did much to harass the representatives of the King. The Governors and other officers sent out from England were result was a very great conflict of interests between the rulers and the ruled.

There was another cause for conflict also. The early settlers of America had brought with them certain institutions of their motherland. They worked these institutions in their new homes. One of these institutions was the English Common Law, which embodied those Fundamental Rights of the individual, which even the King must respect. These Rights could not be destroyed even by the Parliament. It was the conflict over these Rights that resulted in enmity between the colonists and the mother country.

The Declaration of Independence

So long as the menace of the French and the Spaniards existed in North America, these colonies meekly submitted to the dictates of the mother country, but with the extinction of the French and Spanish power in the Seven Years' War, things took a new turn. A historian remarks that with the triumph of Wolfe on the Heights of Abraham began the history of the United States. With the removal of the menace of the French holdings and pressure of the Spaniards, the colonies began to prepare for war. A Congress of representatives of the states was called at Philadelphia in 1775. The Congress appointed George Washington, as the Commander-in-Chief of the army. The French promised aid and ultimately the thirteen colonies declared war against England. On July 4, 1776, the Declaration of Independence was proclaimed. It was declared that colonies "*are free and independent states. They are absolved from all allegiance to the British Crown and as free and independent states have full power to declare war, conclude peace, contract alliances, and to do all other acts and things which independent states may of right do.*"

Establishment of Confederation

With the 'Declaration of Independence' begins the independent history of the United States of America. The colonies as a consequence of the Declaration became independent of the Crown and politically independent of others. Thus, the first thing to engage their attention after the 'Declaration of Independence' was to prosecute the war unitedly. On July 11, 1776, a Committee was appointed which drafted the articles of the Confederation. These articles were approved by the Congress of the states on November 15,1777. The first of these articles named the Confederation "the United States of America." The second article stated that each state retained its sovereignty, freedoms, independence and every power, jurisdiction and right, which was not by this Confederation expressly delegated to the Congress.

But each state was eager to guard its own individual entity. They had come close only for some very specific purposes and this fact was made clear in the third article which stated, "the said states hereby severally enter into friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all forces offered to or attacks made upon them, on account of religion, sovereignty, trade or other pretence." Thus, these states entered into a league of amity and retained that sovereignty, freedoms and independence.

The Congress established by the adhoc Constitution was the Only common institution of the Confederation. It consisted of the delegates of the states, each being entitled to send not more than seven and not less than two representatives. Each state had one vote. During the recess of the Congress, a Committee of the States, composed of one member from each state was entitled to do anything which the Congress was authorised to do.

It is clear from the above description that the Confederation was a loose "Union of States". The articles of Confederation were hardly anything more than conventions. They had no binding force. The Congress of states was to control the affairs of the states but it had no real powers. It was merely a consultative and advisory board. It could only tender advice. It could not compel any state to obey its dictates. The weakness of the Confederation became apparent soon after the war. In the words of Wilson, "*it was a rope of sand which bound none.*"

The war lasted for eight years. The Britishers recognised the independence of the colonies by the Treaty of Versailles in 1783. Soon after the victory, there was a crisis in the life of the infant nation. As remarked above, the Confederation of states was only a very loosely knit body. As soon as the common danger which brought the states together was over, inter-state jealousy began to develop. Trade suffered heavily. Anarchy and chaos reigned supreme. But soon luck favoured the United States of America. An opportunity presented itself and the leaders of the nation succeeded in retaining their union intact. *IS*

The Philadelphia Convention

It has been remarked above that as soon as the War of Independence was over, inter-state bickerings developed. The states of Maryland and Virginia quarreled over the question of navigation of the river Potomac. In order to decide this dispute and also to consider the extension of the power of the Confederation with regard to the commerce, in September 1786, a conference was called at Annapolis. Only five states attended the conference. Alexander Hamilton, one of the delegates, induced the conference to call upon the Congress to summon a convention of delegates of all the states to meet at Philadelphia to consider the question of amending the articles of the Constitution. Accordingly, the Congress summoned the famous Convention at Philadelphia in 1787. Seventy-three delegates were sent by twelve states as Rhode Island did not participate. However, only fifty-five attended and some of them were present only for a few days. The average daily attendance was between thirty and thirty-five. The delegates to the Convention were experienced persons. George Washington, James Madison, Alexander Hamilton, Benjamin Franklin and James Wilson were some of the highly talented and distinguished personalities. Munro remarks, "All that can truely be said of 'the Conventions' make-up' that there were men of widely differing capacities, foresight, temperament, experiences and ingenuity." They approached the problem in a very practical way. They had two aims before them, to establish a stable Central Government to bring order and cohesion among the states and to preserve as much as possible the independence of the states. Prolonged discussions were held. Various formulae were put forward and considered. Ultimately after sixteen weeks of hot discussion, on September 17, 1787, a brief document embodying the constitution of the new Government of the United States was signed unanimously by the States present. It was ratified by Convention in nine States as agreed upon in the Philadelphia Convention and enforced on March 4, 1789.

The Constitution radically changed the character of the States. It established a Federal Government allowing maximum autonomy to the States. At the time of adoption of the Constitution, some of the States kept out of the new Federation, but later joined it. The number of States gradually rose from the original thirteen to the present fifty. The USA today is thus a Federation of fifty States.

The term "United States" when used in a geographical sense on official documents, acts and/or laws, includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa.

The US has twelve unincorporated territories, also known as Possessions, and two Commonwealths. The major Possessions are American Samoa, Guam, and the US Virgin Islands. All of these have a non-voting representative character in the US Congress. The major Commonwealths are Puerto Rico and the Northern Marianas. Commonwealths have their own Constitutions and greater autonomy than possessions, and Guam is currently in the process of moving from the state of unincorporated territory to Commonwealth. The residents of all of these places are full-fledged US citizens, with the exception of those in American Samoa who are US nationals, but not US citizens.

The Commonwealths and Territories together are: American Samoa, Baker Island, Howland Island, Guam, Jarvis Island, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palau, Palmyra Atoll, Puerto Rico, US Virgin Islands (St Croix, St John and St Thomas), and Wake Island.

SALIENT FEATURES OF THE AMERICAN CONSTITUTION

As stated earlier, the present Constitution of the United States of America was adopted at the Philadelphia Convention held in 1787. It came into force in 1789, after it had been ratified by the minimum required number of states. The Constitution is unique in many respects. It is one of the briefest Constitutions in the world. Originally it consisted of seven Articles but twenty-six amendments have been effected in it during following years. The Constitution presents a classic example of its rigidity. The 'Separation of Powers' - a doctrine propounded by Montesquieu, has found favour in the American Constitution in a way unknown to any other Constitution of the world. The application of the theory of separation of powers has been combined with a remarkable system of checks and balances in the US administration.

Again, the judiciary occupies a pivotal position in the American political system. It exercises judicial review. It interprets the Constitution and has developed it. To quote an instance, the Constitution created a weak Federal Government but the Supreme Court has made the Central Government sufficiently strong in order to meet the needs of modern America through its doctrine of implied powers.

Summing up the novelties and distinctive features of the US Constitution, Lord Bryce aptly remarks, "*... yet, after all deductions, it ranks above every other written Constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, its simplicity, and precision of language, its judicious mixture of definiteness in principle with elasticity in details.*"

Following are some of the salient features of the Constitution of the United States:

(1) Written Character

Like other Federal Constitutions in the world, the American Constitution is written in form. It is a brief document consisting of seven Articles and twenty-six amendments. It was in fact a model of draftsmanship, of constitutional elegance, of brevity and of apparent clarity. Indeed it was a skeleton Constitution, since tranters of the Constitution left the details to be filled in by the Acts of the Congress. The Constitution was thus a starting point of taking off ground. It has been adequately clothed with conventions, customs, judicial decisions and legislative measures. The unwritten element in the form of conventions has played a vital role so much so that the very nature of the Constitution stands changed considerably. To take one example, the Fathers of the Constitution provided for indirect election of the President but as a matter of Convention the election has now become direct.

(2) Rigidity

The American Constitution is the most rigid Constitution in the world. It can be amended by a lengthy and cumbersome process. Because of the complicated nature of the amendment procedure, sometimes it takes years before an amendment becomes operative after it has been proposed. Every amendment which can be moved in two different ways must be ratified by three-fourth of the states. The rigidity of the Constitution is obvious from the fact that during all these years, it has been in operation; only twenty-six amendments have been effected in the Constitution.

Despite its rigidity, the Constitution has been able to adapt itself to the changing circumstances. It has consequently stood the rigours of industrial revolution and democratic upsurge, the turmoils of the civil and global wars, economic crisis of the last century and the global Recession of 2009 and the terrorist attack on its World Trade Centre in New York in recent past.

(3) Federal Character

The American Constitution is federal in character. It was originally a Federation of thirteen States but due to admission of new states, it is now a Federation of fifty States. A constitutional division of powers has been made between the Centre and the federating units. The Constitution enumerates the powers of the Centre and leaves the residue of powers to be exercised by the federating states. All powers not delegated to the centre are exercised by the States. The Constitution thus creates a weak Centre because residuary powers have been given to the units. However, in practice, the Federal centre in America has become very powerful due to the application of the doctrine of "Implied Powers" as propounded by the Supreme Court of the USA. Had the Centre been weak, the Federal system would not have survived the onslaught of civil war and other eventualities of baffling nature.

(4) Supremacy of the Constitution

The Constitution is the supreme law of the land. Neither the Centre, nor the States can override it. A law or an executive order repugnant to the Constitution can be declared unconstitutional and invalid by the American Supreme Court.

(5) Separation of Powers

The US Constitution is based on the doctrine of 'Separation of Powers' though there is no direct statement of the doctrine of separation of power. However, the three wings of administration viz., the executive, the legislature and the judiciary are interdependent and cannot be separated entirely in the interests of good Government yet an attempt has been made in the American Constitution to separate them as much as possible. The Congress is the legislative organ. The President is the head of the executive. He is elected indirectly by the people and has nothing to do with the Congress. He enjoys a fixed tenure of four years and is not a member of the Congress and cannot be removed by vote of no-confidence before the expiry of his tenure of office. He does not participate in debates, nor can he dissolve the Congress. Both are independent of each other. The Supreme Court heads the federal judiciary and enjoys freedom in its work. However, the separation of powers, in actual practice, has been limited to a very large extent. The President, today, controls the legislative policy. This fact was established during Rooseveltian era. The President is impeachable by the Congress. This ensures coordination between the executive and legislative branches of the Government. Likewise, the other branches of the Government have been earmarked a slice of function of the other branches entrusted to it.

(6) Checks and Balances

Recognising the importance of close coordination among three organs of the Government, the Fathers of the Constitution introduced 'Checks and Balances'. The powers of one organ were so devised as to exercise a check upon the powers of others. As for example, the President can veto the bills passed by the Congress. The Senate shares with the President his powers of making appointments to the various federal offices and conclusion of treaties with foreign States. All such treaties must be ratified by two-thirds majority in the Senate. Through this power, the Senate controls the internal administration and external policy of the President. The organisation of judiciary is determined by the Congress and the judges of Supreme Court are appointed by the President with the consent of the Senate. The Supreme Court can declare the laws passed by the Congress and executive action taken by the President *ultra vires.* In this way, the three organs of the Government have been interlocked and interchecked. Eulogising this feature, Ogg remarks, "*No feature of American Government is more characteristic than the separation of powers combined with precautionary checks and balances. Nothing quite like it can be found in any other leading country of the world .*"

(7) Bill of Rights

The Constitution guarantees Fundamental Rights of person, property and liberty. It is however, noteworthy that these Rights were incorporated in the Constitution by a number of amendments effected after the Constitution was promulgated. They were not enumerated in the original draft of the Constitution. But by subsequent amendments (first ten), individual liberty has been effectively safeguarded. The Rights of citizens are enforceable by recourse to the judiciary. These Rights cannot be modified or suspended except by a constitutional amendment. Freedom of speech, of worship, of *habeas corpus,* no unreasonable search, and seizure which constitute the hallmark of a just society, are now part and parcel of the Constitution.

(8) Judicial Review

The Supreme Court and lower federal courts possess power of judicial review of the legislative enactments. The federal judiciary can declare any legislation or executive action null and void if the same is found to be inconsistent with the provisions of the Constitution. The judiciary thus acts as the guardian and custodian of the Constitution and Fundamental Rights of citizens. The Supreme Court has so interpreted the Constitution that it has adapted it to the changing needs of society. It has enlarged the powers of the Congress. The supremacy of the judiciary over the executive and the legislature has led to the remark that the Government of USA is governed by the judges and that the American Constitution is what the judges make of it. The critics describe the Supreme Court as a third chamber as well and judicial review as judicial veto.

(9) Republicanism

Unlike UK where a hereditary monarch is the head of the State, the USA is a Republic with the President as the elected head of the State. The Constitution derives its authority from the people. Moreover, the Constitution makes it binding upon every constituent State to opt for the Republican form of Government.

(10) Presidential Form of Government

The Constitution provides for the Presidential type of Government in the USA. All executive powers are vested in the President. The President is not constitutionally responsible to the Congress in the manner in which the executive is responsible to the legislature in England or India. He does not attend its sessions, nor initiates legislation directly, nor answers questions. The Congress cannot remove him during the term of his office which is fixed for four years. On the other hand, the President cannot dissolve the Congress. The members of his Cabinet are neither members of the Congress nor answerable to it. They are his 'errand boys' who have been rightly termed as the 'family' of the President or his 'kitchen' Cabinet.

(11) Dual Citizenship

The US Constitution provides for dual citizenship for the people of the United States. An American is the citizen of the USA as also of the state where he or she is domiciled. It is in contrast with the idea of single citizenship as incorporated in the constitution of India which establishes a federal form of Government as well.

(12) Popular Sovereignty

The American Constitution is based on popular sovereignty. The Preamble of the Constitution runs as follows:

"*We the people of the United States in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for USA*". The ultimate sovereignty in the USA is thus attributed to the people. The doctrine of popular sovereignty attributes ultimate sovereignty to the people and substitutes constitutional system of Government for arbitrariness.

(13) Spoils System

Spoils System has been an important ingredient of the American Constitution since the inception of American Constitution. It prevailed in the USA in its worst form during the nineteenth century. According to this system, a Government office was considered as a spoil for the services rendered to the prospective President at the time of presidential election. Hence, so long as a particular President was in office, he had his supporters in all offices and they strove their best to ensure his election or re-election. If their party was ousted in the next election, they had to tender their resignation and the new President had to keep their substitutes in those key offices. It led to inefficiency and corruption. Hence, an act known as Pendleton Act (1883) was passed to put a stop to this system. Henceforth, about eighty per cent of such offices were to be filled through competitive examinations. Thus Spoils System persists only in twenty per cent cases. These offices still fall in the patronage of the American President.

(14) Bicameral Legislature

Like UK, USA too has a bicameral legislature. Its Lower House is termed as the House of Representatives whereas the Upper is known as the Senate. The Upper House of USA, unlike other upper chambers in the world, is more powerful than the Lower. It is equipped with legislative, executive and judicial powers. It is described as the most powerful upper chamber in the world. Its tenure is six years unlike that of the Lower House which is elected only for two years. Moreover, it is a compact House consisting of hundred members whereas the Lower House consists of four hundred and thirty-five members.

Thus it can be concluded that the American Constitution is a unique Constitution presenting a constitutional model entirely different from that of the UK. Its stability and strength is the envy of the world constitutions. Some of the developing democracies like Sri Lanka and Pakistan opted for it and some of the constitutional experts and legal luminaries in India have recently suggested its adoption in India if India, is to be brought out of morass of fractured mandates, hung parliaments and eventually unstable coalition government.

Growth of the Constitution

The original Constitution of the United States of America consisted of seven Articles containing not more than four thousand words. It was framed to satisfy the requirements of the original thirteen States with a small population living in the pastoral cum agricultural age. The Constitution of 1779 embodied only general outlines of the framework of the Federal Government. But the present Constitution of the USA cannot be identified with the original constitutional document prepared by the Philadelphia Convention. Today it includes many rules and regulations, judicial interpretations and conventions, etc, which affect the distribution and exercise of the sovereign powers of the State. It has, in fact, changed beyond recognition according to the needs of the times. The various factors which have led to an all round development of the American Constitution may be summed up as follows:

(1) Amendments

Though the process of amending the Constitution has been extremely slow, yet it had led to its growth. There have been only twenty-six amendments to the Constitution since its inception. Ten amendments were added on December 15, 1791, soon after the promulgation of the Constitution. These amendments incorporated the 'Bill of Rights' for the American people. The eleventh (1798) and twelfth (1804) Amendments removed some ambiguities in the Constitution. The thirteenth Amendment (1865) abolished slavery in America. The fourteenth Amendment (1868) regulated citizenship. Equal rights of the white and coloured people were established by the fifteenth Amendment (1870). The sixteenth Amendment (1913) authorised the Federal Government to tax incomes, without apportionment among several states. The eighteenth Amendment (1920) prohibited the manufacture, sale and transportation of intoxicating liquors. The nineteenth Amendment (1920) granted suffrage to women. The twentieth Amendment (1933) changed the dates for the beginning of the sessions of the Congress and of assumption of office of the President. The twenty-first Amendment (1933) repealed the eighteenth Amendment but prohibited the transportation of the intoxicating liquors into a State against its law. The twenty-second Amendment (1951) regulated re-eligibility of the President. The twenty-third Amendment (1961) gave the residents of the districts of Columbia the right to vote for President and Vice-President. The twenty-fourth Amendment, proposed in 1962 and ratified in 1964, prohibited the imposition of any poll tax. No person is to be denied right to vote by reason of failure to pay poll tax. According to the twenty-fifth Amendment passed on February 11, 1971, if the President cannot perform his duties due to his physical or mental ailment, the Vice-President will work as the acting President. This amendment further authorises the President to nominate a Vice-President in consultation with the Congress, if the office of President falls vacant as a consequence of these amendments.

The twenty-sixth Amendment which enables the right to vote to all citizens of eighteen years of age or more was signed by President Nixon on July 5, 1971. The US Supreme Court upheld the legislation so far as it related to federal elections only.

However, the Constitution would not have been dynamic as to keep pace with the rapidly changing social and economic conditions if it had banked upon amendments alone. Vital changes have been introduced in the original Constitution through other means which have been explained in the following paragraphs.

(2) Laws

The second factor responsible for the development of the American Constitution is the laws passed by the Congress. The framers of the Constitution prescribed only the general outlines of the Federal Government. The determination of details in regard to the organisation and functioning of the Government was left to the discretion of the Congress. Naturally, laws passed by the Congress have contributed more to the evolution of the Constitution than the twenty-six amendments. The Constitution made provision for the establishment of the Supreme Court, but its organisation, tenure and salaries of the judges were left to be determined by the Congress. Similarly, the Constitution prescribed the composition of the two Houses of Congress but the method of election and suffrage were left to be determined by the state legislatures. The Electoral Act of 1887 regulated the election disputes. Original Constitution is silent about the organisation of the administrative departments. *The* Congress, by law, determines their number, functions, organisation, etc., Likewise, it lays down the budget procedure and has authorised the establishment of a national banking system. The Constitution did not make any provision regarding legislative procedure. The laws enacted by the Congress provided for three readings and various rules for the regulation and control of debates. All these laws dealing with the organisation and functioning of the Government have expanded and enriched the Constitution to a great extent.

(3) Judicial Interpretation

Judicial decisions and interpretations have also played a major part in the evolution of the American Constitution. So great has been the role of the judiciary that some commentators of the American Constitution have named the Supreme Court as a continuous Constitutional Convention. Munro remarks "*One might almost say that it (Constitution) undergoes some change every Monday when the Supreme Court hands down its decisions*". Justice Holmes once remarked, "*Judges do and must legislate.*" The implied powers of the Congress owe their origin to the Supreme Court. The Supreme Court has given wide meaning to the words used in the Constitution. The powers of the National Government to regulate inter-state commerce, railways, telegraph, aeroplanes and radio all owe their origin to the decisions of the Supreme Court. The Supreme Court interpreted the clause which lays down that Congress shall have power to raise and support armies in such a liberal manner as the latter got empowered to draft millions of men even in peace time. The Supreme Court has strengthened the Centre at the cost of states, quite in keeping with the needs of the time.

(4) Development by Executive

Some powerful Presidents of the USA have also contributed a lot towards the growth of the American Constitution. Washington, Jackson, Lincoln and Roosevelt moulded and developed the Constitution by a vigorous use of their presidential powers. Ogg and Ray have rightly remarked, "In the exercise of their powers, many Presidents have taken and maintained position virtually settling constitutional question previously considered upon or even giving the Constitution some meaning of application never before attributed to it." As for example, President Washington created a Cabinet and began consulting it. Since then, the Cabinet has become a regular organ of the US Government. To take another example, treaties require Senate's approval. The Presidents have been evading this senatorial approval by naming the treaty as executive agreement or gentleman agreement. The latter did not require any approval. Some Presidents have successfully maintained that Congress had no authority to restrict their power, to remove executive officials, or to send the armed forces to any part of the world to safeguard American lives. Sometimes even the heads of the departments have taken decisions which involved interpretation of the Constitution and addition of new meanings to the Constitution. Though such orders are subject to judicial review, yet they often go unchallenged and become a regular part of the Constitution.

(5) Conventions

The conventions have played a magnificent role in the development of the Constitution of the United States. The conventions are not a peculiar feature of the British Constitution alone. The American Constitution is equally rich in this respect. The framers of the Constitution only prepared a skeleton. The flesh has been added to it by the usages and conventions which have evolved during the preceding years. In the words of Beard, a great revolutionary change in the American Constitution has not been brought about by amendments or statutes but by customs and conventions. The conventions have changed the very spirit of the Constitution. Some of these conventions are given below:

(i) The Fathers of the Constitution provided for an indirect election of the President. But by convention, the election of the President has become more or less direct. The Fathers of the Constitution wanted the electors to act independently while casting their votes in favour of candidates they deemed suitable for the office of American Presidency. The electors in practice are pledged before hand to vote for candidates nominated by their respective parties. They act as human robots. Thus, the election of the President has become virtually direct.

(ii) According to the Constitution, the Speaker of the House of the Representatives should be chosen by the House itself. In reality, he is the nominee of the majority party.

(iii) The system of Senatorial Courtesy, according to which the Senate accepts the recommendations made by the President for the appointment of the federal offices, is the result of a convention.

(iv) Similarly, the rule that a candidate for the election to the House of Representatives should belong to the constituency which he seeks to represent is based on a convention.

(v) The practice of the President keeping the leader of the majority party in the Senate informed about the progress of treaty negotiations is also the result of a convention.

(vi) According to the Constitution, money bills must originate in the House of Representative but Senate can traditionally consider revenue bills.

(vii) Prior to 1940, a convention set by President Washington—that a President should not contest election for more than two terms—was strictly adhered to in America. President Roosevelt violated it as he contested even the fourth time. Hence, necessity arose to effect an amendment in the constitution in order to restrict the President's tenure beyond two terms. In 1951, according to a constitutional amendment, the tenure of President was limited to two terms. Professor Beard goes to the extent of emphasising that conventions in USA play as important a part as in UK. However, this is an exaggerated view.

The above description shows that conventions play a significant part even in the working of a written Constitution of the United States. But it must be remembered that the extent of the conventional element in the American Constitution is much less than that in the British Constitution as the latter is an evolved constitution and is said to be the child of accidents.

It may, therefore, be concluded that American Constitution framed at Philadelphia has steadily expanded through amendments, laws passed by the Congress, judicial interpretations, executive orders and conventions. In the words of Munro, the American Constitution is "*the horse and the buggy affair projected into a motorised era but in almost every line it has been expanded, modified and brought into articulation with the life of each succeeding age*".

THE AMERICAN FEDERATION, SEPARATION OF POWER AND CHECKS AND BALANCES

Originally the American Federation consisted of thirteen States, now it comprises fifty units. It was established through centripetal process. The thirteen sovereign States surrendered some of their powers and created the Union (United States). Naturally enough, they surrendered as little powers as could be possible. The Federal Government has, therefore, delegated and specified powers. The residuary powers lie with the states. In this way, the Constitution leaves a vast authority with the states. Woodrow Wilson pointed out that of a dozen great legislative measures carried through by the British Parliament in the nineteenth century, only two would have come within the scope of federal legislature in America i.e., the Corn Laws and Abolition of Slavery). The Constitution contains three lists of subjects, namely, a list of what the Congress can do, a list of what the Congress cannot do and a list of that the States cannot do.

Division of Powers

The Constitution (Article I, Section 8) enumerates eighteen powers for the US Congress. They include, among others, powers to impose and collect taxes and duties, etc, foreign trade, inter-state commerce, naturalisation, common defence and general welfare of the United States, coinage and weights and measures, promotion of science and other useful arts, constitution of tribunals inferior to the Supreme Court, declaration of war, raising armies and making all laws necessary for the execution of these powers.

The other two lists detail powers which are forbidden to the Centre and the States respectively. Section 9 of Article I, forbids the Federal Government from suspending a writ of *habeas corpus* or from passing *ex-post facto* laws, granting titles of nobility, passing laws affecting religious beliefs of people in any way and abridging freedom of speech and press. The States are forbidden from making any alliance or treaty with any foreign power, coinage and, among other things, maintaining armies. The tenth Amendment provides that the powers not granted to the Centre and forbidden to the states rest in the people themselves. These relate mostly to certain rights of the people which no Government can violate. The Constitution thus preserves the essential authority of the people in consistency with democratic principles.

The scheme of division of powers in the US Constitution shows that the States enjoy all those powers which have not been given the Federal Government and which have not been forbidden to the states. Such a system of division of powers is bound to make the Central Government weak since it enjoys jurisdiction over specified items only.

Thus, the Fathers of the Constitution established a dual system of Government—a National Government with its own governmental agencies, exercising powers entrusted to it by the Constitution, and State Governments equipped with residuary powers. Each of these sets of Government in its own sphere, is autonomous and independent, neither encroaching on the other. Any change in the division is effected through an amendment of the Constitution.

The Status of States in the American Federal System

The Fathers of the Constitution were keen to make the States stronger than the Centre. Hence, residuary powers were given to the States. In forming the Union, the states surrendered only partial sovereignty. The tenth Amendment of the Constitution specifically provided that they continued to possess an undefined amount of residual authority. There is no denying the fact that the thirteen States which joined the Union were sovereign States but they agreed to surrender their sovereignty when they decided to constitute one State - the United States of America. They however, exercise those powers which have been left for them according to the Constitution. In other words, the states are free to exercise residuary powers without federal control. The States do not possess the right of secession from the Union though the Constitution is silent about it. Since the southern States which attempted to secede, failed miserably in an open conflict (civil war), it became an eye-opener for the member States that the union is in dissolvable. The Supreme Court of USA also in 'Texas vs. White' (1869) described the Union as "*an indestructible Union composed of indestructible states*".

The States enjoy legal equality though they vary in size and population. The Federal Government also owes the same obligations towards these states. This legal equality is evider from the fact that each State has been accorded equal representation in the Senate. The Constitution clearly specified that this provision cannot be changed by amendments.

Federal Guarantees of the States

In order to strengthen the position of the states in the Federal system, the Constitution imposes certain obligations on the Federal Government, viz. respect for their territorial integrity, guarantee of a Republican form of Government and protection against invasion and domestic violence. A brief explanation of these guarantees would not be out of place.

(1) Respect for Territorial Integrity

The Federal Government has been required to respect territorial integrity of the states. No state can be made to lose its territory save by its own consent. In other words, no new state can be carved out of the existing states, unless the legislatures of the States affected accord their/ approval.

(2) Guarantee of a Republican Form of Government

The Federal Government guarantees to every State a Republican form of Government. However, the Constitution has not elucidated the word, "Republican." Hence, it has been subjected to varied interpretations. The Supreme Court has refused to pronounce its judgment on the matter which is political rather than constitutional or judicial. The President or the Congress can also give their interpretations.

(3) Protection against Invasion and Civil Commotion

The Constitution enjoins upon the Federal Government to protect each of the States against invasion and on the application of the legislature or of the executive against domestic violence. In case of invasion, the Federal Government intervenes without awaiting request from the State concerned. Such federal power flows from the "federal war power". For quelling domestic insurrection, the Federal Government intervenes only when the State authorities make a request to the Central Government or federal laws are violated or national property is endangered. The decision regarding federal intervention rests entirely with the American President. For instance, in 1941, President Franklin D Roosevelt sent troops to crush a strike in a Californian aircraft factory though the State Government made no such request.

(4) Obligation of States towards Federal Government

The States also owe certain obligations towards the Federal Government. The States are required to conduct elections to federal offices as the Constitution does not make provision for a separate federal election machinery. The members of the Electoral College are elected in each state in a manner prescribed by the State legislature. The senators are also elected directly in each state. The members of the Lower House of the Congress are elected in each state generally in single member constituencies. Further, the states can take initiative in preparing an amendment of the Constitution. Their participation is essential for ratifying the proposed amendment as well.

Growth of Federal Authority

Although the Constitution created a very weak Centre, the powers of the Federal Government have widely increased. Many factors have been responsible for this, viz. judicial interpretation, amendments, laws and regulations of the Congress and President, emergencies, charismatic personality of the President, etc.

(1) The Supreme Court has so interpreted the Constitution that the powers of the Federal Government have increased even at the cost of the States. It developed the doctrine of 'Implied Powers'. This doctrine, enunciated mostly by Chief Justice Marshal of the Supreme Court, provides that the Constitution not only enumerated certain powers for the Centre, but also gave all those powers which are implied in the enumerated ones. There have been several cases when the Supreme Court, in interpreting the Constitution, has helped the Centre through the application of this doctrine. A few examples may be quoted to illustrate the application of this doctrine. The Constitution empowers the National Government to "regulate commerce with foreign nations and among the several States". The Congress has derived from this clause of the Constitution the power to control all means of transport and communication. From the clauses giving the Congress the power to promote general welfare, it has derived the authority to pass social legislation like old age insurance schemes and other laws of this nature. Again, through the powers of the Congress to impose and collect taxes and duties, the Congress got the authority to establish and control exclusively the Central Bank of the United States. This is how the Federal Government has acquired greater authority which was originally not granted to it by the Constitution.

(2) Many amendments have increased the powers of the Federal Government. The fifteenth Amendment gave the authority of judicial review to the Supreme Court over States' legislation. - The sixteenth Amendment authorised the Congress to levy and collect taxes on incomes of all kinds whereas the original Constitution had prohibited the Central Government to impose direct taxes.

(3) The Congress has passed many laws which have widened its powers. Similarly, American Presidents have issued rules and regulations in the exercise of their authority widening these powers of Federal Government.

Presidents like Lincoln, Washington, Roosevelt and Wilson have exercised dictatorial powers. They have taken action even without proper constitutional justification. President Lincoln declared war against southern states on the question of slavery. Roosevelt's 'New deal' policy widened the control of Federal Government over subjects originally within states' jurisdiction.

(4) Further, the growth of international relations and commerce has also enabled the Federal Government to widen its sphere of authority.

(5) Recently, the leadership of the United States of the western powers has placed unrestricted power in the hands of the Federal Government. In times of emergencies like economic depression, war, and cold war between the erstwhile USSR and the USA and currently the back breaking economic recession of 2009 which has gradually overtaken the entire world, the people of United States look to the National Government for solving all national and international problems in which the country is directly or indirectly involved.

(6) The Federal Government makes grants-in-aid to the State Governments and even the local bodies. Fourteen per cent budget of states comes through these grants. Naturally the Federal Government reviews and examines the schemes and policies where the money is spent. The conditions generally laid down for the grants of financial assistance are as follows:

(i) The State shall expend the money for the specific purpose for which it is granted.

(ii) The state shall itself incur expenditure from its finances for the purpose in hand.

(iii) The State shall establish suitable administrative agencies.

(iv) In return for the assistance, the Federal Government will have the right to impose federal standards and regulations, federal inspection and federal audit of accounts. Besides, the Federal Government can withhold the grants if the state concerned does not meet the national standard. This reflects that the acceptance of a general grant means acceptance of a certain type of Federal control over State autonomy. In the words of White, "*Where there is money there is power and where there is money on this scale, there is substantial power. There can be a type of fiscal dependence which can erase the constitutional division of power.*"

(7) There have come into existence many interstate cum federal organisations of mutual consultation. These organisations help in evolving uniform policies under the direction of the Federal Government.

All these factors have, thus, enormously increased the powers of the Federal Government. The increase in powers of Central Government, particularly in the present century, has led Rosec Drummond to remark " *... our Federal System no longer exists and has no more chance of being brought back into existence than an apple pie can be put back on the apple tree*". This is an exaggerated view. No doubt, the era of rigid Federalism has ended in the USA. Instead, the era of Cooperative Federalism has dawned. The Federal Government exercises the powers of guidance, supervision and control but that has neither encroached upon the autonomy of the states nor sapped their vitality. The States still constitute important entities. A vast residue of functions is still vested with them. In the words of Griffith, "*Their (States') vitality is still very great. The same social conscience that was among the factors causing the Supreme Court to let down the barriers to increased governmental activity nationally has its counterpart in its wide extension of the sphere of permissible state activity.*" In fact, they have developed their own reserved powers. They still provide a vast number of essential services to the people. They still control the police: the civil and criminal law, education and Local Government. In fact, there has been intensification of governmental activity both at the national and state levels. Munro has rightly remarked, "*There has been an overall expansion of governmental power in the country as a whole and an intensified activity of governmental activity at every level, local and state as well as national.*" The States are still the pivot around which the American political system revolves. However, it will be wrong to conclude that Federalism is under eclipse in USA. American Federalism has kept pace with the times. Schwartz correctly remarks, "*The American states may be under constantly growing Federal control yet it is unlikely that they will even have to look to Washington in determining their behaviour as every area of Local Government in England and Wales must look to Whitehall and Westminster if it becomes possessed of the desire to embark upon innovations.*"

AMENDMENT OF THE CONSTITUTION

One of the essential features of any Federalism is the rigidity of the Constitution. The US Government fulfils this requirement to a remarkable degree. Article 5 of the Constitution lays down a very cumbersome and difficult procedure for its amendment. There are two methods by which amendments can be effected. They are brought out as follows:

(1) Amendments may be proposed by two-thirds majority in each House of the Congress. It must be ratified by three-fourths of the total number of States. The ratification may be done either by state legislatures or by special conventions held in the states for this purpose. The mode of the ratification is to be determined by the Congress.

(2) The States themselves may take the initiative in proposing amendments. If two-thirds of all the state legislatures apply to the Congress for this purpose, the Congress calls a constitutional convention which shall, on the basis of the original recommendation, propose the amendments. The amendments must be ratified by three-fourth of all the states either through their legislatures or at specially convened conventions. The mode of the ratification is to be determined by the Congress.

Out of the twenty-six amendments which have been effected so far, all but one have been initiated by the Congress and ratified by the state legislatures, i.e., Congress proposed them and submitted them for ratification to the state legislatures. Only the twenty-first Amendment which repealed the eighteenth Amendment, (which had enforced prohibition) was ratified by conventions in the state.

Criticism of Amendment Procedure

(1) The Constitution did not fix any time limit for ratifying the constitutional amendments. This results in a great delay in their passage and implementation. Ohio State, for example, ratified a proposal after eighty years. Likewise, in case of a child labour amendment proposed by Congress in 1914, only twenty-eight States have ratified it so far. But now the Congress by its resolution can place time limit on ratification. For example, in the case of eighteenth and twenty-first Amendments, it clearly laid down that the amendment would be lost if not ratified by the required number of states within seven years.

(2) If a state once ratifies an amendment, it cannot go back. But if it rejects once, it can ratify it later provided it feels like revising its decision.

(3) The Constitution prescribes that an amendment may be proposed by the Congress by two-thirds majority in each of its Houses. But it is silent as to whether two-thirds majority means the majority of total membership or members present and voting. As a matter of practice, it is the latter interpretation which has prevailed.

(4) There are, moreover, certain provisions which cannot be amended. For example, the right of every state to equal representation on the Senate cannot be taken away without the consent of the state concerned. Also no state can be split up into two or more or any state merged with it, without the prior consent of the legislature of the state concerned.

(5) The system of amending the US Constitution is extremely rigid. Between 1789 and 1971, thousands of proposals of constitutional amendments were moved, but only twenty-six were finally accepted. This shows that US Constitution lacks the virtue of adaptability with the change of time. The requisite two-thirds majority of the Congress is not easily procured. Hence, it has been suggested that only a majority vote in both the Houses of Congress and ratification by two-thirds of the states should be made essential to effect constitutional amendments. The proposal has not however, been formally accepted as it envisages consent of the States and not that of population.

(6) The system of amendment is not sufficiently democratic as it envisages consent of the States and not that of the democratic population. The critics describe it as too conservative a system. An amendment ratified by thirty-seven states which may have an absolute majority of the American population, can be stopped by the opposition of one small state from being effective. In other words, fourteen small states with, say a little more than one-tenth of the total population, may decide to oppose a proposal for constitutional amendment and may thus prevent about nine-tenths of the people from effecting any change in the Constitution. This is not in consonance with the spirit of democracy.

Despite the rigidity of the Constitution, the American people have succeeded in changing it as necessitated by the times. Between 1913 and 1933 alone, for example, six major amendments were effected. In the words of Professor Munro, "*US Constitution is a living organism. The rigidity has only been provided as the fathers of the Constitution were cautious to avoid all possibilities of capricious changes in the Constitution.*" According to William Harvard, all the amendments except the twenty-second had direct or indirect democratising tendency, and have all made some contribution to the conception of a Government resting on a basis of as popular a sovereignty as possible. It may, therefore, be concluded that despite vehement criticism the Constitution has been quite adaptable and it has not clogged the American progress. In the words of Zink, "*In the United States the formal process is burdensome but other methods have grown up which are much less onerous.*"

Separation of Powers

The principle of 'Separation of Powers' is one of the most important features of the American Constitution. The Constitution clearly states that all legislative, executive and judicial powers are vested in the Congress, the President and the Supreme Court respectively. There is no other Constitution in which the demarcation of the three wings of administration is so clear. In India, for example, the entire legislative power of the Union is vested in the Parliament, but the Parliament consists of the President and the two Houses. This shows that the executive has been associated with the legislature in a very active manner. Similarly, in England, Parliament is sovereign in every respect and the executive is subordinate to it. However, in the United States, each of the three wings is separate and distinct without being dependent upon the other. It is said that fathers of the American Constitution were deeply impressed by the theory of 'Separation of Powers' as proposed by Montesquieu. In their attempt to make the three wings as separate as possible, they have made each one of them independent of each other. The President, for example, has a fixed tenure and is not responsible to the Congress. The Congress is independent of the President since it cannot be prorogued or dissolved by him. Similarly, the federal judiciary is also independent of both the executive and legislature. No judge of the Supreme Court can be removed except by a very difficult procedure of impeachment. Thus, as Finer points out, the "*American Constitution was consciously and elaborately made an essay on the separation of powers and is today the most important polity in the world which operates upon that principle.*"

Checks and Balances

However, the American Constitution has not produced a 'clean severance' of the three organs of the Government. To secure the liberty of the people, the authority of Government was further weakened, i.e., by introducing checks and balances, so that one organ may put a curb on the other. They possibly apprehended that an organ of the Government, left to itself completely, might degenerate and misuse its power, thus becoming tyrannical and oppressive. The Constitution has, therefore, provided for a system of internal checks and balances. According to Professor Ogg, "*No feature of American Government, national, state and often local is more characteristic than the separation of* *powers combined with precautionary checks and balances.*" The executive, for example, is controlled by the Senate in the matter of making appointments to high offices. It is laid down that all high appointments made by the President must be ratified by the Senate. Again, it is the Senate which ratifies all international treaties made by the President. This power was effectively used in 1919 when the Senate refused to ratify the Treaty of Versailles which had been accepted by President Woodrow Wilson. The Senate, an important part of the US Congress, thus controls the internal administration through its power of endorsing appointments made by the President and also its external policy through its power of ratifying all treaties and agreements to be made with a foreign State. The Senate, moreover, is the court of impeachment against the President and other high officials of the United States including the judges of the Supreme Court.

The President in turn, controls the Congress in the sense that all bills passed by the Congress must be submitted to him for his approval. He may veto a bill; however, the Congress can override his veto by repassing the bill with two-thirds majority voting separately in the two Houses. But such a majority is not easily available. Hence, the bills vetoed by the President are invariably killed. The President can exercise his pocket-veto during the last ten days of the session of the Congress, by keeping the bill pending on the table, neither rejecting it nor passing it. With the end of session, the bill is automatically killed. The President can exercise his influence on the Congress by threat of convening its special session if his point of view is ignored. During the special session, the members of the Congress are not paid TA and DA. Hence, they won't like to turn a deaf ear to the President's message as otherwise he may convene special session.

Besides, the President has been vested with the power of issuing executive orders as well. These executive orders have the same force as that of the law. Keeping in view his influence in the domain of legislation it has been opined, "*To say that American President does not possess legislative powers is to talk of philosophy.*"

Again, both the President and the Congress have certain checks on the judiciary. The President appoints the judges of the Supreme Court whose approval is to be accorded by the Senate. Their salaries, etc, are determined by the Congress subject to certain constitutional restrictions. The judiciary in turn exercises its control over the executive and the legislature through its power of judicial review. It can nullify the laws passed by the Congress and the orders issued by the executive if they are found to be at variance with the spirit of the Constitution. Thus, the judicial review has assumed the shape of judicial veto.

The Supreme Court sets the framework, both negatively and positively, within which the Government works.

Thus, we see that the principles of separation of powers and checks and balances are intertwined in the American Constitution. These two principles pervade the American political system from top to bottom. Dr Finer has aptly remarked, "*Not all the objects which the fathers had in view have been realised but their main intention to effectively separate the powers has been realised; for they destroyed the consent of leadership in Government which is now so important in the present age of ministrant politics.*" Professor Beard is of the view that the separation of powers is a primary feature of American Government and is constantly made manifest in the practices of Government and politics.

It may not however, be out of place to point out that checks and balances which were designed to promote overall equilibrium often have aggravated rather than ameliorated the ill effects of separation. The presidential veto has been abused many a time and the Senate also has stood as an insuperable barrier in the way of American President, particularly while according assent to treaties. Such a state of affairs results in paralyzing the functioning of the Government, particularly if the chief executive belongs to one party and the Congress is dominated by the other. President Reagan, a Republican in the past and later Clinton, a Democrat felt pitched against opposition-dominated Congress. The Republican President—George Bush the successor of Clinton did not face staunch opposition to that extent and had comparatively smooth sailing despite harsh steps viz. war with Iraq. President B. Obama, a Democrat will be luckier as in both the Houses, he will find favourable majority of Democrats.

Supreme Court at times acting as a 'Super legislature' or a 'Third character' reflects that the checks at times prove as irritant and eventually an eyesore.

The Supreme Court has also been overshooting the mark as in case of invalidating the New Deal Legislation of President Roosevelt. Hence, Ogg and Ray remarked that checks and balances "*designed to promote overall equilibrium often operate rather to aggravate than to ameliorate the ill effects of separation as for example in the case of the presidential veto and senatorial assent to treaties*".

CHAPTER 26

THE CONSTITUTION OF SWITZERLAND BACKGROUND SALIENT FEATURES

Introduction

The Republic of Switzerland is a small country, about one-third of the area of New York state, situated in the heart of western Europe. Her people live on both sides of a great mountain chain. It is surrounded by Germany in the North, by France in the West, by Austria in the East and by Italy in the South. Its people differ in race, religion, language and to some extent in civilisation. In the words of Dr Munro, "People of Germanic, French and Italian stocks, speaking four languages, have been so squeezed together by powerful neighbours that they have grown into one." The Swiss speak four different languages. A majority of them speak German, some of them speak French, some of them speak Italian and a considerable fraction speaks Romanish. In 1938 however, Romanish was adopted as a national language. There is no uniformity of religious belief as well. About one-third of the Swiss citizens have embraced Protestantism and one-third Catholicism. Despite all these differences on the basis of race, religion and language, the Swiss constitute a thoroughly coherent nation. A very healthy tradition of Self-Government has been established on the Swiss soil for the last seven hundred years or more. The intermingling of religion and languages has proved to be a blessing in disguise. It has prevented the growth of excessive exclusiveness and promoted religious tolerance and ardent nationalism. Zurcher has correctly said, "*Today there are no people in Europe among whom a sense of national unity and of patriotic devotion is more firmly fixed than among the Swiss. In a world grown somewhat weary of the too frequent reiteration of principle of political self-determination for racial and linguistic groups, the Swiss offer a splendid example of how statehood and national patriotism can he fostered in utter defiance of such principles.*" In fact, each group admits the right of the other groups to maintain their distinct entities. None makes an attempt for encroachment upon the others. Thus, a high sense of democracy has developed in Switzerland. The Swiss deeply cherish and strongly uphold communal and cantonal autonomy. Hence, the Swiss Constitution is the true mirror of the feelings of the Swiss who are the adherents of "Direct Democracy" and principle of "Popular Sovereignty."

Bryce has very correctly acknowledged the superiority of Swiss democracy over the rest of the democracies of the world in his famous volume *Modern Democracies.* In his words, "Among the modern democracies which are true democracies, Switzerland has the highest claim to be studied. It is the oldest, for it contains communities in which popular Government dates further back than it does anywhere else in the world." In fact, Swiss democracy is not only one of the oldest but is one of the best democracies of the world. It is really a model of democracy worth quoting and appreciating. Apart from being a home of direct democracy, all of its institutions are based on democratic principles.

Another distinctive fact about this beauty spot of the continent is its dynamic neutrality. In war-torn Europe, Switzerland alone could keep itself neutral and enjoy political stability. Rappard describes this policy of neutrality as "*the true palladium of Swiss independence.*" Even the most aggressive powers like that of Nazi Germany and Fascist Italy respected the Swiss neutrality. It may however, be pointed out that Swiss neutrality is neither the outcome of timidity nor faith in non-violence. It neither implies isolationism nor passivity towards international affairs. In fact, Switzerland enjoys a unique position as a channel of diplomatic communication between countries at war against each other. According to Hans Huber, her neutral status, "*permits the country to fulfill certain humanitarian missions in these times of steadily growing deadly conflicts*". This policy of neutrality has ushered in an era of peace and prosperity for the country. Hence, it has become the cornerstone of the Swiss foreign policy.

Switzerland by a slender margin in a countrywide vote on March 3, 2002 decided to leave behind decades of isolationism and became a member of the United Nations. The referendum was passed by a surprisingly comfortable popular vote—54.6 per cent for membership of the UN and 45.4 per cent against it.

The Old Confederation

Switzerland is the product of a process of unification which commenced in 1291 and was completed by 1848. Prior to 1291, Switzerland was nothing but a number of separate Cantons which neither had a central nor coordinating authority. These Cantons were somewhat subservient to the Habsburg rulers of Austria. In 1291, three Cantons, Uri, Schwyz and Unterwarden constituted a Confederation in order to safeguard their ancient liberties and assert their independence from the Austrian domination. They foiled the attempt of Habsburgs to regain their feudal authority. It encouraged the rest of the Cantons as well. Hence by 1353, eight Cantons joined the Confederation. The number of members of the Swiss Confederation rose to thirteen by 1648. The Treaty of Westphalia recognised it as a sovereign State.

The Old Confederation constituted in 1291 could not stand the onslaught of the conquering armies of revolutionary France. Switzerland ceased to be a Confederation and became a French Protectorate. Henceforth, Switzerland was to be a centralised State. The new unitary Constitution was so incompatible with the Swiss traditions of Local Self-Government that it entailed wide resentment and caused grave dissatisfaction amongst the freedom-loving Swiss. Hence, in 1803, through the Act of Mediation, Napoleon was forced to restore the autonomy of the Cantons constituting the Helvetic Republic.

With the fall of Napoleon, the Helvetic Republic also came to an end. The Old Confederation was revived, though in a modified form, through a Federal pact which was given recognition by the Congress of Vienna. The French suzerainty however, proved to be a blessing in disguise. Between 1798 and 1815, the foundations of modern Switzerland were laid. Six more Cantons were added to the thirteen already existing Cantons by the Act of Mediation. In 1815, three more French-speaking Cantons were added, thus giving to Switzerland its present configuration. During this period, the trilingual status of the country was recognised.

Between 1815 and 1848 there commenced a regular tussle between centrifugal and centripetal forces. The former stood for greater unification and centralisation, whereas the latter advocated maximum autonomy for the Cantons. These two antagonistic forces represented by Radicals and Federalists, respectively, clashed openly in 1847, when seven Catholic Cantons attempted to break away from the Confederation by forming a separate league—the "Sunderband". A Civil War between the secessionists and the radicals resulted in the defeat of the former. Hence, a new constitutional project was drawn up. It became the organic law of Switzerland in 1848.

The Constitution of 1848

A Diet Committee of fourteen drafted the Constitution of 1848 which after approval by the Diet was submitted to referendum and was ratified by an overwhelming majority of the Cantons and the people. Thus, the Confederation was converted into a Federal State. Though it seemed to be a step of substantial importance yet it was purely a compromise arrangement. The Cantons were granted sovereignty so far as their sovereignty was not limited by the Federal Constitution. The Constitution of 1848 made provision for Bicameral Federal

Assembly, the Collegial Executive, Referendum, Initiative, Common Citizenship and Federal Tribunal.

The Constitution of 1874

The Constitution of 1848 lasted for twenty-six years only. The tendency towards greater centralisation became more pronounced although the Federalists still pleaded for social and municipal privileges of the Cantons. The Radicalists advocated the abolition of such rights and privileges. They stood for inalienable rights and liberties for the Swiss under the protection of a unified and centralised law. The Radicals were backed by a considerable majority of the population. Thus, the Constitution of 1848 necessitated the revision. The Federal Assembly framed the new Constitution and referred it to the people for their approval. It was adopted by a thumping majority of the Swiss citizens and came into operation on May 29, 1874. The revised Constitution carried centralisation still farther by providing for the nationalisation of railway under Federal ownership and vesting more powers with the centre. Moreover, the powers of the Federal Tribunal were considerably enhanced. The separate judicial systems of the Cantons were abolished.

The Constitution of 1999

Although the Constitution of 1874 was quite a rigid Constitution and the proposals for its complete revision were rejected, yet there have been quite numerous (about 150) partial revisions, vast majority of which enhanced the Central Government. In view of the numerous amendments, since 1874, it was felt desirable to integrate the accumulated amendments into a new text. The new text was adopted by the Federal Parliament on December 18,1998, and adopted by a Referendum on April 18, 1999. The Parliament issued the Enforcement Decree on September 28,1999 and the new Constitution came into force on January 1, 2000. Thus, Switzerland entered the new millennium with a new legal foundation. However, the new Constitution does not radically change the structure of the Swiss Federation as envisaged in the 1874 Constitution.

MAIN FEATURES OF THE SWISS CONSTITUTION

The Helvetic Republic is still called a Confederation of twenty Cantons and six half Cantons, though since 1848 it has adopted a Federal Constitution which was considerably revised in 1874 and rewritten in 1999 incorporating all the amendments made there up to. It is an ancestral house of direct legislation and the only country in the world still practicing direct democracy. In the words of Dr Munro, "*nothing in the Swiss political system is more instructive to the student of modern democracy*". Following are the salient features of the Swiss Constitution:

A Written and Lengthy Constitution

The Swiss Constitution of 1848 as amended in 1874 and in subsequent years, and integrated in 1999 is a written document like that of the USA although it is double in size to that of the American Constitution. The 1999 Constitution consists of one hundred and ninety-six Articles. Some of the frivolous details like fishing, hunting, gambling dens, lotteries, sickness and burial of the indigent, cattle diseases, qualifications of members of liberal professions, etc., are also incorporated in the Swiss Constitution. In fact, the Swiss Constitution effects a compromise between the advocates of cantonal rights and the admirers of the strong Federal Government. Hence, according to Brooks, it attempts to anticipate and prevent "causes of internal friction and possibility of civil strife". Such an attempt automatically makes the Constitution voluminous.

Following a Preamble and general provisions (Articles 1 to 6) and preceding the Articles regarding the organisation of the legislative, executive, and judicial branches of the Federal Government (Articles 143 to 191), the new Constitution now formally and explicitly separates and codifies the four traditional pillars of Swiss Constitutional Law: (i) *Democracy:* Articles 136 to 142 address the participation of the Swiss people in the Federal Government, by providing rules governing popular initiatives for total or partial revision of the Federal Constitution and mandatory or optional referenda against federal statutes; (ii) *Rule of Law:* Articles 7 to 36 address general principles of Governmental actions and provide an extensive catalogue of Fundamental Rights; (iii) *Social Welfare:* Article 41 declares certain "Social Goals" to be achieved by the Federal and cantonal Governments; (iv) *Federalism:* Articles 42 to 135 address the relationship between the Swiss Confederation and the twenty-six Cantons, as well as municipalities, and enumerate the federal legislative powers.

The Swiss Constitution is rigid in character, though not so rigid as the American Constitution. The procedure of its amendment is rather complicated. There are two methods of amending it:

(1) Through Referendum

If both the Houses of the federal Parliament agree by passing a resolution to revise the Constitution, either wholly or partially, they may draft such a proposal and submit it to the vote of the people and the Cantons. If a majority of the citizens voting at Referendum and a majority of the Cantons approve of it, the amendment is made in the Constitution. In case, only one House agrees to the proposed revision and the other does not, then the proposed revision is referred to the people's vote to ascertain whether the proposed revision is necessary or not.

If the people approve the proposed revision by a majority vote, Federal Assembly stands dissolved. The newly elected Assembly takes up the proposed revision. If both the Houses of the Assembly ratify it, which is a foregone conclusion, the revision is submitted to the people and the Cantons for vote. If majority of the people and the Cantons approve of it, the revision is effected.

(2) Through Constitutional Initiative

A complete or partial revision of the Constitution can also be effected through popular initiative, on the petition of at least, one lakh Swiss citizens.

In case of a complete revision of the Constitution through Initiative, the question whether there should be a revision of the Constitution or not, is referred to the people for their vote. If majority of the people give verdict in favour of such a revision, fresh elections of the Federal Assembly take place. The newly elected Assembly drafts the new Constitution and after approving it which is a foregone conclusion, submits it to the Referendum of the people and the Cantons. If majority of the people and the Cantons give verdict in favour, the revised Constitution is enforced.

As regards partial revision of the Constitution, both formulative and unformulative Initiative methods can be adopted.

In case the demand for amendment is "unformulative" or is "couched in general terms," the Federal Assembly if approves such an amendment, draws up such an amendment as desired by the sponsors of such an amendment and submits it to the vote of the people and the Cantons. If the majority in both the cases approves it, the said amendment is effected. If the Federal Assembly does not approve of it, the unformulative proposal is submitted to the vote of the people. If majority of the citizens favour the revision, the Federal Assembly is required to draft the once-disapproved proposal in accordance with the Initiative and then submit it to a regular Referendum of the people and the Cantons. On the approval of majority of the people and the Cantons, the revision of the Constitution takes place.

If the proposal for Initiative is in a formulated form, the Federal Assembly approves it, submits it to a Referendum of the people and the Cantons. If both the Houses of the Federal Assembly do not approve of the initiated amendment, they may submit counter-proposals along with the popularly initiated proposal to the people and the Cantons for vote. In both the cases, approval of majority of the people and the Cantons is essential. It may be noted that if both the drafts— formulated Initiative and counter-draft—are approved or if one is approved by the people and the other by Cantons, neither of them shall come into force.

The above quoted complicated procedure reflects clearly that the Swiss Constitution is rigid in character. Since 1874, only two proposals for complete revision were made. Both were rejected. There have been quite numerous partial revisions of the Constitutions, vast majority of which enhanced the competence of the Central Government. Rappard has rightly pointed out, "*It is easier for the Swiss people to amend their fundamental law than their ordinary statutes against the will of a hostile Parliament.*"

A Republican Constitution

Switzerland is one of the oldest Republic of Europe. The integrated Constitution of 1999 establishes Republicanism not only at the Centre but also in the various Cantons. Republicanism is in fact the very breath of the Swiss way of life. It guarantees the Constitutions of the Cantons provided that the latter "assure the exercise of political rights according to Republican (representative of democratic) form". In fact, the framers of the Swiss Constitution were keen to emancipate the individual from shackles of the aristocratic, mercantilist and clerical traditions which had for centuries crushed the individual's freedom. Hence, they abolished the aristocratic and oligarchic privileges and guaranteed to the Swiss equality before law. Every Swiss participates in determining his Government. All political institutions in Switzerland are elective in character. The principle of Republicanism is in fact the bulwark of Swiss democracy.

A Federal Form of Government

Though the Republic of Switzerland is formally designated as the Swiss Confederation, it is in fact a Federation. The Preamble of the Constitution, if properly interpreted, clearly establishes that a permanent Union and not a loose league of States has been set up in Switzerland. The Preamble speaks in the name of "Swiss People and Cantons" and states: that the Swiss Confederation came into being to consolidate the alliance and to maintain and increase the unity, strength and honour of the Swiss nation. The Preamble further emphasises that to achieve the solidarity of the Swiss nation "we adopt the following Constitution". The powers of Government have been divided between the national and the cantonal Governments on the American pattern. Article 2 of Constitution states, "the purpose for which the Confederation is formed which is to secure the independence and security of the Fatherland as against foreign nations, to maintain peace and good order within, to protect the liberty and rights of the people and to foster their common welfare." Thus, the Federal Government has been vested with powers of national importance and the residuary powers have been left to the Cantons. The Cantons however, enjoy supremacy in their own sphere, though some restrictions have been imposed upon them, viz. (a) they must have republican Constitution; (b) their Constitutions must not be contrary to the Federal Constitution; (c) they must be subject to revision or amendment by popular vote.

It may however, be pointed out that the powers of the Federal Government have increased considerably since 1874. The prominent factors which have contributed to the process of centralisation are: wars, economic depression, the demand for ever increasing social services and the mechanical and technological revolution in transport and industry. In fact, these factors had affected all Federations, Switzerland being no exception. In the words of Andre, "*The danger of this tendency is that to the extent they suffer the encroachment of the central power, the Cantons will generally cease to he sovereign states at all and become simple district administrations carrying out the behests of the Federal authority.*" In fact, this is rather an exaggerated view. The spirit of local autonomy still pervades in Switzerland. The Cantons still possess the residuary powers. The courts of Cantons still administer the laws of the Federal Government and the officials of the Cantons still work for the Federal Government in the Cantons. No change in the Federal Constitution can be made without the approval of the Cantons. Article 3 of the Constitution very well explains the real position of the Cantons in Swiss Federation: "*The Cantons are sovereign so far as their sovereignty is not limited* *by the Federal Constitution and as such they exercise all rights which are not delegated to the Federal power.*"

The Constitution guarantees the Cantons their sovereignty, inalienability of their territories and rights of their citizens. Moreover, they are allowed to conclude treaties with foreign States in respect of matters of public economy and police and border relations provided that these treaties are not detrimental to the interests of the Federation and the other Cantons. However, communication between the Cantons and the Federal Government must take place through the Federal Council. The Cantons are allowed to keep their own permanent military force. This is a novel provision. Defence in other Federations of the world is generally the concern of the centre. During emergency however, the Federal Government is vested with exclusive authority over the cantonal forces. The discipline of the cantonal forces also is regulated by the federal laws. In case of any dispute between the Cantons or the outbreak of rebellion—a rarity in a country like Switzerland, the Federal Council may assume even dictatorial powers. We can, therefore, conclude that on the whole, the Cantons possess large amount of autonomy though central intervention predominates. Zurcher rightly pointed out "The Cantons remain (and are destined to remain) important elements of Swiss constitutional system." However, the Swiss Federal model is so designed that it 'reflects legislative centralisation and administrative decentralisation.' It adds to the strength and to the perpetuity of cantonal autonomy. If the Federal authority has been extended in certain domains so has been the case with the Cantons sphere of activity. The Swiss in general are eager for the maintenance of the cantonal autonomy. Hence, usurpation of their powers by the centre is apt to be a pinprick rather an irritant for an educated Swiss citizen. However, Cantonal autonomy has been eclipsed at times; nevertheless the Confederation draws its authority from the Cantons. The Constitution expressly recognises the judicial personality of the Cantons in the composition of all federal organs and also the process of amendment. In the words R. C. Brooks, "It represents a compromise between the advocates of cantonal rights and those in favour of a strong federal government and therefore tries to anticipate and prevent causes of internal friction and possibility of civil strike." The cantons have expressively and indirectly accepted the tendency towards centralisation. Due to the consciousness of their being small units, they have reconciled with this development. The Federal Governments aim has not been coercive or aggressive. It has played persuasive and conciliating attitude towards Central Governments. Carl J. Fredrick observes rightly "Not a single Canton in large in relation to the Federation as a whole, the Cantons have been less sharply divided by the partisan issues and the Central Government has practised marked moderation....."

Democratic Character of the Swiss Government

Democracy and Switzerland are almost synonymous. In the words of Bryce, "*Among the modern democracies which are true democracies, Switzerland has the highest claim to be studied. It is the oldest, for it contains communities in which popular Government dates farther back than it does anywhere else in the world, and it has pushed democratic doctrines farther and worked them out more consistently than any other European state.*" The principles of sovereignty of the people, rule of law, equality among the citizens and universal adult suffrage are the hallmark of the Swiss Constitution. The principle of sovereignty of people is reflected through the representative character of national and cantonal legislatures, the Preamble, adoption of the institutions like Referendum and Initiative, and the republican character of the executive offices. The principle of equality is implemented through the abolition of aristocratic and oligarchic privileges. In some of the Cantons, primary assemblies of all adult citizens constitute the legislative bodies. They are termed as "*Landsgemeinde.*" Every adult citizen has the right to speak and make his own laws and elect officers. The officials in this country have not developed bureaucratic tendencies which are so very common in the other democratic countries of the world. In the words of C J Friedrich, "*the Swiss appear to have a more effective democratically responsive officialdom than any other country except Sweden*". It is thus obvious that in the true sense, democracy exists in Switzerland. In fact Switzerland is the only country in the world which can claim itself to be a direct democracy. Zurcher rightly opines, "*Switzerland and Democracy have in recent years become almost synonymous.*" However, it will not be out of place to point out that such a perfect democracy, stood eclipsed partially till 1971 as Swiss women did not enjoy the right to vote. Through a constitutional amendment effected in February, 1971, the right to vote was extended to women as well. Hence, Switzerland is no longer a male dominated or male-run democracy.

Liberalism

The liberal philosophy of the nineteenth century had a profound influence on the framers of the Swiss Constitution. Hence, the impact of that philosophy is discernible at every point. The emancipation of the individual from restraining influences of the church and other paternalistic agencies, the abolition of all political privileges, the provision of freedoms of petition, belief, speech, the press and Assembly, free and compulsory education, equality before law, freedom of trade and commerce are some of the important rights and privileges revealing the liberal philosophy ingrained in the Swiss Constitution. Andre rightly remarks, "We *have all the characteristic features of democracy functioning between a minimum and maximum ceiling ... Conservative ... as soon as it has anything to conserve ...*" During the recent years however, liberalism of the Swiss Constitution has been toned down to some extent due to gradual accentuation of governmental intervention in the economic sphere. In the words of Zurcher such a development has however, not altered, "*fundamentally the traditional liberal orientation of the Swiss policy*".

Swiss Constitution and Citizen's Rights

The Swiss Constitution of 1874 did not contain a formal bill of Rights as found in erstwhile USSR and in India. This does not however, mean that the Fundamental Rights of Swiss citizens were not protected by their Constitution or were not incorporated in it. In fact, the Rights ensured to the Swiss citizens were scattered in a number of Articles of the Swiss Constitution. Now these Rights have been integrated under Title 2 of the 1999 Constitution. Articles 7 to 40 mention these Rights. The Constitution guarantees to Swiss citizens equality before law, freedom of movement in the country and residence in any part of the country, and freedom of press and association, and of petition. Right to vote is allowed to the citizens of eighteen or more years of age. However, a few restrictions have also been imposed upon these Rights. For instance, liberty of expression is exercisable within the bounds of morality. Freedom of religion also is subject to protective restrictions. No citizen can refuse to fulfil the obligations of citizenship on religious ground. The establishment of new religious orders is not permitted. The citizens possess the right of forming Unions provided they do not indulge in activities detrimental to the interests of the State. They can seek free elementary education in Government schools. Right to marriage is also guaranteed. Moreover, these Rights have corresponding duties as well.

These Rights both guaranteed by Federal Constitution and also the cantonal Constitution are not mere paper rights. The citizens possess the right of *habeas corpus,* their Rights are safeguarded by Federal Supreme Court—the highest and the only national tribunal of Switzerland. Contravention or abrogation of any one of these Fundamental Rights by the legislature or executive is prevented through the Federal Tribunal. The authorities have been enjoined to respect the Fundamental Rights and contribute to their realisation. Hans Huber has very well explained the significance of these Rights when he emphasised that they "*are bulwarks which protect the linguistic, religious, political* *and social minorities against any bias towards dictatorship on the part of a majority and guarantee a sphere of privacy to the human personality"*.

Plural Executive

The Constitution vests the executive power with the Federal Council which consists of seven members who are elected by the Federal Assembly for four years. The executive powers in Switzerland are not entrusted to a single man, unlike that of USA, or UK, where the President and the King constitute the executive heads of the States respectively. The "President" of the Swiss Council who is elected by the Federal Assembly for a period of one year only, is simply "first among equals". He in no way enjoys a position superior to that of the rest of his colleagues. As a Chairman of the Federal Council, he however, performs certain ceremonial functions which are possessed by formal heads of the States. The Swiss executive has thus been correctly described as "*a collegium fulfilling simultaneously the functions of a Government and of a Chief of State,*"

Secondary Position of the Judiciary

The Swiss judiciary plays a less vital role than the judiciary in the United States of America or India. The Swiss Federal Tribunal has only limited judicial review authority. It can declare only a cantonal law unconstitutional. The Swiss Constitution makes it specifically clear that "the court shall apply laws voted by the Federal Assembly". In other words, it does not exercise judicial review of the laws passed by the Central Government. The election of judges by the Federal Assembly further establishes the inferior position of indicinary in fact it reflects denigration of judiciary in Switzerland. Moreover, the Swiss Tribunal is the only national court which stands alone instead of being at the head of a great national judicial system as is the case in USA or India.

Bicameral Legislature

The Swiss legislature also is bicameral in character. The Upper House known as the Council of States represents the Cantons of Switzerland on equal basis like that of American Senate which accords equality to all the states. It is a small House consisting of only forty-six members. The National Council is the representative lower Chamber. It consists of two hundred members. Both the Houses have been kept on par with each other in respect of their powers. In the words of C.F. Strong, "Swiss legislature like Swiss executive is unique. It is the only legislature in the world, the functions of whose Upper House are in no way differentiated from the lower."

A Dynamic Constitution

The Constitution of Switzerland is dynamic in character. It has been adapting itself to the exigencies of time and keeping pace with the social aspirations of the people. For instance, the traditional freedom of speech and that of forming associations were curtailed to some extent during the two World Wars, as Switzerland was keen to maintain her neutrality. The Government followed a policy of neutralisation within the framework of the old Constitution. The State intervened whenever independence of the Swiss citizens was endangered. The emanation of Labour Legislation in 1877, 1908 and 1920 stands witness to this fact. Economic Depression of 1930 necessitated State intervention to bring the country out of the morass of economic insecurity and utter frustration.

Thus we come to the conclusion that the Swiss Constitution is indeed unique in character. Its direct democracy devices are the envy of the democratic Constitutions of the world. Its plural executive combining in itself the advantages of parliamentary and presidential executives and avoiding their pitfalls is another laudable contribution to the mechanism of world Governments. It's imbibing liberal philosophy negating the two extremes—capitalism and orthodox socialism is indeed a commendable choice of admixture of merits of both the systems. Dr Munro has rightly remarked, "*So here is democracy that has been spared most of the ills that democracy is presumed to bring in its wake. To what causes may this good fortune be ascribed? Partly to the smallness and compactness of the country its natural defensiveness and its varied resources. Partly also to the intelligence, patriotism and good sense of its people ... Partly again to the relatively equal distribution of property ... And ...finally, to sound traditions ...*"

Before we end this chapter, the civil rights available to Swiss citizens may be further elaborated. As said earlier the 1999 Constitution in Chapter I of Title 2 mentions these Rights. Some of the important Rights ensured to the Swiss are as follows:

RIGHTS (AS PER 1999 CONSTITUTION)

(1) Right to Citizenship

According to Article 37 every citizen of a Canton is a Swiss citizen. However, citizenship in Switzerland is three-fold. Any person cannot be citizen of Switzerland without being the citizen of Canton and no one can be the citizen of a Canton unless he is a citizen of commune. Citizenship is as such guaranteed in Switzerland.

(2) Right to Move

Every citizen possesses the right to move freely in any part of the Confederation. But in case of inter-Canton movement, certificate of origin can be asked for by the cantonal authorities. The right to reside can be refused in the following circumstances:

(a) If the individual has been deprived of his civil rights.

(b) If the individual has been repeatedly sentenced for grave misdemeanour.

(c) If the individual has become a permanent burden on public charity.

(3) Equality before Law

Article 8 assures equality before law to the citizens. In Switzerland, there are neither subjects nor privileges of rank, birth, person or family. It guarantees equal treatment to all the citizens. It provides, "*Every Canton is obliged to accord to citizens of other confederate states the same treatment it accords to its own citizens as regards legislation and all that concerns judicial proceedings.*"

(4) Right to Press, Association and Petition

The Swiss citizens have been granted the right to free press and publication of their views. But such freedom is subject to the laws made by the Cantons for the repression of the abuses. In case of default, the Central Government has been authorised to frame penalties for the purpose. In fact the Swiss press is highly responsible and conservative, rarely engaged in sensationalism, unlike USA and India. Likewise, the freedom of association enables a Swiss citizen to form any religious, social, economic and political association. The right to assemble at any place has also been guaranteed. However, unlawful associations or assemblies inimical to the interest of the State are banned.

(5) Right to Petition

It is unique in character. It permits the citizens to send petitions to the Government in protest to its policies and activities. However, this right pales into insignificance in view of provision of Initiative in the Constitution.

(6) Free Education

The Swiss can seek free elementary education in Government schools.

(7) Right to Religion

Article 15 has guaranteed freedom of religion and conscience. Every person has the right to freely choose his or her religion and profess it. There can be no compulsion regarding religious belief, worship, etc. Religion in no way restricts the civil and political rights of the citizens. No citizen can refuse to fulfill the obligations of citizenship on religious grounds.

(8) A neutralised State

The status of a permanently neutralised state has been conferred on Switzerland by an International Treaty. As per its decision, it has neither to wage war nor join any military alliances. Till 2002, it was not even a member of UNO. It joined it in 2003 though it did not renounce its neutralised status. Switzerland has been rightly portrayed as "*a happy island in a sea of unrest.*" Its dynamic neutrality has enabled it to find an honourable place in the Comity of Nations.

Besides the Rights referred above, the Swiss citizens enjoy the fruits of Direct Democracy through the methods of Referendum and Initiative. The Constitution of Switzerland has made people conscious of duties as well.

Thus, the Swiss Constitution has incorporated an elaborate chapter of Rights and it cannot be denied that the basic Rights as provided in other democratic Constitutions of the world have been assured to them through the New Constitution.

It is a small compact country inhabited by enlightened people who are fully apprised of the value of basic freedoms. Hence, they cherishingly aspire for their enjoyment. Referendum and Initiative are the enviable Rights which the Swiss citizens alone enjoy. As such they rightly can feel proud of their democracy—the only direct democracy in the world.

CHAPTER 27

THE FRENCH CONSTITUTION AND ITS SALIENT FEATURES

Historical Background

France has been described as a laboratory of political experiments. In the held of constitution-making, the French hold a world record. Since 1789, France has had no less than twelve regimes and thirteen constitutions. The political changes cover extremes in time ranging from the twenty-one days of the ***Acte Additionnel*** of 1815 to the sixty-five years of The Third Republic, and extremes in content ranging from complete changes of regime to simple modifications carried out by the normal processes of constitutional revision. If in Britain and the USA the political arrangements have persisted, slowly evolving, over a long period of time, in France, on the other hand, "the pendulum has swung from ***Government d' assemblee*** to a highly personalist regime in a comparatively short span". In view of its unique historical features, the Government of France makes an interesting study.

The French Revolution, 1789

The French Revolution, 1789, is the key to French politics from that date to the present. Prior to it, France had an autocratic Government of the worst type which ignored the interests of the people. According to Neumann, "The pre-revolutionary era, known as the ancient regime, was characterised by a combination of absolutism and centralism conceived by strong kings like Louis IX and Philip the Fair, intensified by the extraordinary Cardinal Richelieu, and carried to new heights by Louis XIV." Under such conditions, the Revolution was inevitable which occurred in July, 1789 when the Estates General was convened which transformed itself into a 'National' Assembly and, in a great burst of activity, abolished or reformed away most of the old feudal prescriptions of the State—the privileged position of the church and the clergy, the guilds, the nobility and drew up the famous declaration of the Rights of Man. In September, 1791 it gave to France a written constitution for the first time but this constitution failed to satisfy the radical revolutionaries. The King was deposed and later put on trial, condemned and guillotined. France was declared a Republic. The Constitution of the First Republic of France, 1793, was quite liberal and radical. It provided for direct elections, manhood suffrage, primary Assembly of citizens to consider proposed laws and a plural executive of twenty-four members. But this Constitution could not be implemented, as the country was experiencing a Reign of Terror. In 1795, the State was entrusted to the Directory: a Committee of five men. But even this Council of five men could not function effectively as the members quarreled among themselves. Faced by rebellion, the Directory urged Napoleon to handle the rebellion. The Directory was replaced by a three-man consulate of which Napoleon was named the first Consul in 1799. Reducing the other two Consuls to ciphers, Napoleon came to acquire political supremacy and crowned himself Emperor of the French in 1804. France again reverted to monarchy and the Revolution which began as a rebellion against an effete autocracy ended up with public support of an autocracy more ruthless, more centralised, more efficient than any France had ever known.

Second Republic (1848-51)

Napoleon ruled France as Emperor till 1814 when he himself was overthrown and Louis XVIII reigned the throne. Louis soon came into conflict with the people and was overthrown in 1830. A new dynasty put Louis Philippe on the throne. The Charter of 1830 was a little more liberal than that of 1814 but it also failed to win the support of the people for the new regime. Louis Phillippe ruled France from 1830 to 1848 when he was overthrown by a rising in Paris, and France became a Republic. The Constitution of the Second Republic was prepared and adopted by a popularly elected National Assembly and it declared the people as sovereign. Louis Napoleon was elected as President by universal suffrage but he in 1852 declared himself as Emperor Napoleon III, thereby bringing the Republic to an end. He continued to rule France till 1870. His defeat in the Franco-German War brought his end and a provisional Government was established.

Third Republic (1870-1940)

The period 1870-75 was a kind of interregnum with a provisional Government working under the organic laws. It took five years to frame the Constitution which established a republican form of Government and specifically provided that the new form of Government was not to be changed even by a constitutional amendment. No doubt, it was so rigid a Constitution that only three amendments took place between 1875 and 1940. The Constitution firmly and finally set up a Republic which signified a definitive triumph of republicanism over monarchism.

Briefly put, the Constitution of the Third Republic provided for a President and a two-chambered legislature. The President, elected jointly by both chambers for a seven-year term, was Commander-in-Chief, head of the executive branch and President of the Council of Ministers; he received and appointed ambassadors; he symbolised the State. However, all his acts required the countersignature of a minister. His position was, in fact, like that of the British sovereign.

The legislature consisted of the Chamber of Deputies and the Senate. The Chamber of Deputies, popularly known as the Lower Chamber was elected for a four-year term by universal manhood suffrage (The women did not have the right to vote). Though the Constitution contained the dissolution clause, convention denied its use with the consequence that every Chamber lived out its full term. The Upper Chamber, the Senate, was indirectly elected, by the ninety departments of France, serving as the constituencies (The department is a local unit in France). The electors were made up, in the greatest part, of the municipal and departmental Councillors. The Senate had a nine-year term with one-third members retiring every three years. A minimum age of forty years was fixed for the membership of the Senate. It was co-equal in powers to the Chamber of Deputies except that money bills were to originate in the Lower Chamber.

Three points may be noted about the Third Republic, though it lasted for a long period of seventy years. The first is that it was marked by extreme Cabinet instability. Between 1873 and 1940 France had ninety-nine Cabinets and out of them only eight lasted for two years. The Cabinet was entirely dependent on the goodwill of the legislature which it could not dissolve. While the Chamber could compel the ministry to resign through an adverse vote, the ministry could not get the Chamber dissolved. Secondly, the Third Republic was socially very conservative. It was due to two reasons: firstly the second-ballot system favoured the middle-of-the road parties—the Radicals and Radical Socialists; secondly, the composition of the Senate was such as it heavily weighed in favour of the villages and small towns as against the few metropolitan areas. Thirdly, once the Republic was established, there was no constitutional means of altering it. Although the Constitution of 1875 was drawn up by an Assembly including a majority of Monarchists in such a way as to facilitate a transition from monarchy to republic, the irony is that the transition never took place. Once the Republicans got control of the regime, they quite deliberately excluded the Monarchists. All attempts to strengthen the Cabinet or presidency against the legislature were defeated by the "Republican Defence." Such attempts were identified with anti-republicanism and counter-revolutionary.

Fourth Republic (1944-58)

France entered World War II as a deeply divided nation and without much enthusiasm. In the beginning it suffered heavy military reverses in the aftermath of which the Third Republic collapsed in 1940. The National Assembly, called at Vichy, abrogated the Constitution of the Third Republic and conferred authoritarian powers on Marshall Petain to constitute a new Government with its headquarters at Vichy, a place in Southern France. (Northern France was under German occupation). A kind of dictatorship was set up. However, during the Vichy regime, a resistance movement was started by General de Gaulle. On August 25, 1944, the German forces in France surrendered and General de Gaulle became the head of the provisional Government. On August 17, 1945, the French Government issued an ordinance outlining the electoral law under which the Constituent Assembly was to be elected. The Assembly elected on October 21, met on November 6, 1945 and passed a new Constitution which was however, rejected by the people of France on May 5, 1946. Then a new Constituent Assembly was elected in June, and a new Constitution was drafted which was ratified on Octoberl3, 1946 and promulgated on October 27, 1946.

The Constitution of the Fourth Republic remained in force from 1946 to 1958. It was the result of a compromise between several political parties and groups and also represented a compromise of political ideals. The Constitution of the Third Republic had established unitary Government for both metropolitan France and her overseas territories, whereas the Constitution of the Fourth Republic provided for a unitary Government for metropolitan France (France minus her possessions) and the Council of the French Union on the principles of Federalism for her overseas departments and territories. The Constitution declared France a Republic, indivisible, secular, democratic and social and assigned national sovereignty to the people of France. It was a rigid Constitution providing that the republican form of Government could not be changed by any amendment. Claiming to be panacea of the maladies of the Third Republic, the Constitution of the Fourth Republic abandoned the old second-ballot system and instead provided for a system of proportional representation by list method. The old Senate was abrogated and a much enfeebled Upper House, called the Council of the Republic, was created. It was indirectly elected by much the same persons as before; but it was divested of the powers the Senate had formerly possessed. It could not veto, though only delay; and if the Cabinet chose to invoke the so-called 'urgency procedure', the maximum delay was only one hundred days. Furthermore, the Council of the Republic could not (until 1954) amend a bill passed by the National Assembly; it could either accept or reject. It was made the weakest second chamber in the world. The Chamber of Deputies, the Lower House, was named National Assembly by the Constitution of the Fourth Republic (Under the Third Republic the term 'National Assembly' denoted a joint meeting of the Senate and the Chamber of Deputies).

The status of the Cabinet and the Prime Minister was also raised by the Constitution of the Fourth Republic. The intention was to emulate the British pattern and make the Prime Minister the leader of the Assembly by giving him more powers. First, his administrative powers were increased. He was given the chairmanship of the office of ***la fonction publique*** (the civil service) and of the Armed Services Committee. Such chairmanship gave him the patronage and control of the entire civil service and also put him at the centre of defence policy and foreign affairs. Second, his political authority in the Assembly was increased. Though still formally appointed by the President, his appointment became real only when he appeared before the National Assembly with a statement of the policy he proposed to follow and succeeded in getting its vote of confidence by an absolute majority. Having secured the Assembly's confidence he would then select his Cabinet colleagues. The Cabinet was simply his personal creature. The Assembly's power to overthrow Cabinets was substantially reduced. The Cabinet could only be forced to resign on formal votes of censure, or by the loss of a formal vote of confidence, by an absolute majority of the Assembly. Short of this, it could remain in office; it was not 'overthrown' according to the Constitution. The vote on motion of no-confidence could be taken forty-eight hours after the debate, thereby giving the deputies time to reconsider what they were doing. The question of confidence could be raised only by the Prime Minister. Finally, the Prime Minister was given the power to secure the dissolution of the Assembly and the holding of new elections. No dissolution could however, take place until eighteen months of a new Assembly's five-year period had elapsed. The Prime Minister could then dissolve, if there had been two Cabinet crises within, at the most, six months of one another. These provisions were inserted so as to avoid a snap election immediately after the election of a new Assembly and also to inform the Assembly that in case it overthrew Cabinets at the average rate of one every six months, it should be dissolved to face the verdict of the electorate. Although the Constitution of the Fourth Republic was drafted to cure the ills of the Third Republic, its provisions however, never worked. Cabinets were not more stable than under the Third Republic; rather they were less so. The Fourth Republic saw twenty-five Cabinets between 1946 and 1958 with an average life of less than seven months while under the Third Republic it was nine. It used to be commented "French changed their ministers as often as they changed their shirts." While there were some political factors responsible for the failure of the Constitution of the Fourth Republic to ensure political stability in France, its provisions were also defective. The appointment of the Prime Minister became real only when he appeared before the National Assembly with a statement of his policy and succeeded in getting its vote of confidence. After having received the Assembly's endorsement by an absolute majority, he picked his team and again came to the Assembly for ratification of the composition of the Cabinet he had selected. This provision prolonged ministerial crisis and the Premier designate once invested had to make commitments while later on, he might not be able to persuade his Cabinet colleagues to accept. The endorsement clause became so difficult that in 1954 it was amended so that the endorsement became valid by only a relative majority of the Assembly and the Premier designate presented himself and his Cabinet together for endorsement.

It was also provided that the Cabinet need only resign if defeated by an absolute majority of the Assembly. Now what was the utility and prestige of a Cabinet remaining in office whose bills were overthrown by the Assembly by only relative majorities but not defeated in the constitutional way? What purpose would remaining in office serve? While the number of Cabinets falling after a defeat by an absolute majority during the entire life of the Fourth Republic was only five, it saw twenty-five Cabinets. And because of this, the automatic dissolution procedure became a dead letter. Only in one instance the Assembly was dissolved. When the Constitution said that after the first eighteen months of its life an Assembly might be dissolved if two Cabinets were successively overthrown within a six months period, it made an important stipulation: that to be 'over-thrown' meant over thrown in a vote of no-confidence by an absolute majority of the Assembly. And since nearly all Cabinets chose to fall, rather than be pushed, these 'overthrows' did not count so far as the dissolution was concerned.

Thus, the constitutional provisions of the Fourth Republic did not work and within a few years it was conducting just like the Third. The institutions of the new Republic were governed by the old conventions. There were persistent deadlocks in the Assembly and the Governments due to their instability were unable to take urgent and necessary decisions. The deep and bitter political divisions added parliamentary representatives who were bitterly opposed to each other and to the regime. They prevented the Constitution from working properly. The Governments and the Assembly were alike powerless to act. General de Gaulle had opposed the Constitution from the very beginning. He resigned from the premiership and retired from politics before it came into force.

There was no real will on the part of the public and the politicians to defend the Fourth Republic. Disillusionment continued to grow at the failure of the Governments to solve the problems both at home and abroad. From 1955 onwards, there had been deadlock over both constitutional and electoral reform and over future of Algeria where a nationalist rebellion had broken out at the end of 1954. By 1958, the rebellion showed no signs of being overcome. From September 1957 to April 1958, three Governments fell owing to the Algerian rebellion which created a Cabinet crisis. On May 8, 1958 Mr. Pflimolin was designated Prime Minister who was to meet the Assembly on May 13. On hearing this, the revolutionaries in Algiers decided to bring down the regime by striking on that very date. They plotted an insurrection in Algiers. The French army in Algiers found the Government in France weak to meet the situation. The army leaders were contemptuous of the quarrels of the French Parliaments and the vacillations of French Governments, which, as they saw it, had already, cost France the loss of Morocco, Tunisia and Indo-China and were now threatening the loss of Algeria. They were determined to prevent Algeria from going the way of Morocco and Tunisia and becoming an independent State. They were not in favour of negotiations with the Muslim nationalists and were of the view that French victory in Algeria was essential and that French Governments were too weak and divided to guarantee it.

Consequently, the French army in Algeria combined with the settlers and revolted. It occupied all Government offices and demanded a Government of Public Safety, headed by General de Gaulle. De Gaulle emerged from his retirement and on the afternoon of May 15, 1958, declared that he was ready "to assume the powers of the Republic" with a view to ensure the unity and independence of the country. The French Parliamentarians were also of the view that to save France from civil war, General de Gaulle be 'invested' as he alone was able to achieve solution of the Algerian problem and to restore the authority of the State over the dissident element in the army and the public service. There was some difficulty over the 'investiture' as Frenchmen were divided in their attitudes towards a new regime but finally it was achieved. On June 1, 1958, General de Gaulle appeared in the Assembly as Prime Minister designate and was accorded confidence by three hundred and twenty-nine to two hundred and twenty-four, with full powers to govern by decree for six months during which period his Government was to draw up a new Constitution to be approved by a referendum. The Fourth Republic transformed itself into the Fifth Republic without bloodshed and with due respect for constitutional forms.

Fifth Republic (1958)

De Gaulle, as stated above, had assumed office on the specific condition that he would be given a free hand for at least a period of six months. He formed a national Cabinet in which were included a large number of prominent men of France. He was also able to pacify the rebels in Algeria. He assigned Michel Debre, his most devoted and outspoken supporter, the principal responsibility for the drafting of the new Constitution. Assisted by a team of experts, Debre prepared the draft Constitution and on August 27, 1958, presented it to the French Council of State, a group of high civil servants advisory to the Government on legal and constitutional matters, for its opinion. On September 4,1958 General de Gaulle presented to the French people the draft of the Constitution that had been prepared under his authority. He delivered a momentous speech to a huge crowd at the Place de la Republique in Paris which opened the campaign preceding the referendum of September 28, 1958. There were wide comments on the Constitution. The press and periodicals in France were full of discussions, political parties elaborated its weaknesses while political scientists analysed its features. Though a vast section of the opinion was unfavourable, yet the Constitution was approved by a majority of nearly eighty per cent. It has been said that the referendum of September 28,1958 was not a vote for a Constitution, but a vote for General de Gaulle.

The Constitution came into force on October 7,1958. General de Gaulle was elected first President of the Fifth Republic in December, 1958 and Debre, the author of the Constitution, became the Premier.

IMPORTANT FEATURES OF THE CONSTITUTION

The Constitution of the Fifth French Republic was drafted by a small Ministerial Committee headed by-Michel Debre under the authority of General de Gaulle. After having been approved by the Cabinet and the French Council of State and a group of high civil servants advisors to the Government on legal and constitutional questions, the new Constitution was submitted for the referendum of the people on September 28,1958 who approved it by a vast majority of nearly eighty per cent. It came into force on October 4, 1958.

The Constitution contains a Preamble and ninety-two Articles. It has been described as "tailor-made for General de Gaulle", "quasi-monarchical", quasi-presidential, a parliamentary empire, unworkable, "the worst drafted in French constitutional history", and ephemeral. It has both republican and presidential characteristics. It is a Constitution in which diverse constitutional principles are sought to be combined, and whose general characteristics are difficult to describe. The truth is that it is a hybrid. Its main features may be described as follows:

(1) Preamble

The Constitution of the Fifth Republic contains a Preamble which reaffirms the Declaration of Rights of 1789. The Declaration of 1789 was based on the doctrine of 'natural law' and 'general will'. It guaranteed the right of free speech, press, Assembly, and religion, except when limited by law. It also provided for the right to private property except when it is required for public cause. Just compensation was to be paid for acquisition of such property. It also guaranteed the principle of Government through representation, protection against arbitrary arrest, the prohibition of cruel and arbitrary punishment, and the right of the accused to be presumed innocent until proved guilty. The new Constitution has added some more rights. It offers to the overseas territories institutions based on the ideals of liberty, equality and fraternity and conceived with a view to their democratic evolution. But as we know, the Preamble is only a statement of principles without any legal basis. These principles cannot be enforced by any judicial action. They serve only as signposts for the Government which is supposed to implement these principles through legislative enactments. In case a Government ignores them, the remedy is not through legal process. The value of Preamble lies in the solemnity of its proclamation.

Like UK France is a unitary state. The powers have been vested with the central government. The local governments derive their powers from the central government rather than the Constitution.

(2) Provision of Administrative Law and Administrative Courts

France parades equality before law for all citizens but in actual practice Administrative law exists for the civil services. The civil servants can be sued only in specially constituted administrative courts where administrative law exists. For ordinary citizens ordinary courts have been provided.

(4) Popular Sovereignty

Article 2 of the Constitution declares prance as an indivisible, Secular, Democratic and Social Republic. The motto of the Republic is 'Liberty, Equality and Fraternity' and its cardinal principle is Government of the people, by the people and for the people. National sovereignty belongs to the people, who shall exercise this sovereignty through their representatives and by means of referendum. No section of the people, nor any individual, may arrogate themselves or he or she may claim the exercise of it. The Constitution provides for universal suffrage and entitles all French citizens of both sexes who have attained the age of majority the right to vote. The political parties too have been given the right to freely form themselves and freely carry on their activities; but they must respect the principles of national sovereignty and democracy.

(5) Rigid Constitution

Like the 1946 Constitution, the 1958 Constitution includes a special procedure.for revision (Article 89). According to this Article, a proposal for revision (which can come either from the President, or from private members) must, to be effective, be voted first in identical terms by both Houses of Parliament and then ratified by a referendum or, if the President decides otherwise, by a three-fifths majority of both Houses, meeting as Congress. The republican form of Government is not subject to revision. Under the Fourth Republic, the Assembly could dispense with the consent of the Senate by passing such resolution with a two-thirds majority, but under the Fifth Republic, the Senate has an effective veto. It is obligatory to seek its consent before a constitutional revision can be brought about. In case the President decides not to submit a proposed revision to a referendum, such revision must first be passed individually by both Houses of Parliament in identical terms and thereafter by a three-fifths majority of both Houses, meeting as Congress, before it can be brought on the statute book. Although the procedure for revision under the Fifth Republic is relatively simple as far as the constitutional requirements are concerned, yet it is not that easy to implement it keeping in view the prevalence of the multiple party systems in France.

This method of amendments has been termed as ambiguous by the critics. Maurice Duverger comments, "Article 89 has an in built ambiguity. It's ambiguous in that it does not make clear whether the Presidents' decision not to submit a proposed revision to referendum renders the first stage unnecessary or is taken only when this has been completed". Inadequacy of Article also lies in the fact that the Act does not specify as to how th§< proposal for revision is to be passed by the Parliament. Even the words identical terms lack clarity.

(6) A Mixture of Parliamentary and Presidential forms

The Constitution of the Fifth Republic seeks to combine two very different principles—the principle of Parliamentary Government and that of Presidential Government. As a matter of fact, the constitutional text is an incomplete description of the system of Government and so it is difficult to label the Constitution as representative of the continuity of the State— "an arbitrator above the accidents of political life." While the head of State in a parliamentary Government is a figurehead, the President of the Fifth Republic in France plays a positive role. Though he does not govern, he does more than reign. The presidency has been exalted at the expense of the Prime Minister and the Cabinet. Thus, the Constitution of the Fifth Republic may be said to be quasi-presidential and quasi-parliamentary. In the words of C. F. Strong, "That the President should appoint the other members of the government (Article 8) and that the Government (Ministry) should be responsible to the Parliament (Article 20) to that extent France under the fifth Republic has a Parliamentary form. But there are several features which make the system a semi Presidential System based on the principle of separation of powers. Firstly, the President is indirectly elected by the people. Secondly, the ministers are not the members of the Parliament and thus, are not subjected to the discipline of the parties and the pressure of the elections. Thirdly, the President is the active head of the executive. Fourthly, the President has the right to dissolve the Parliament and call for the new elections. The Constitution gives to the President emergency powers." These features reflect the Presidential nature of the Executive. However, it is neither parliamentary nor presidential.

(7) Separation of Legislative and Executive Powers

Another important feature of the 1958 Constitution is the separation of legislative and executive powers making ministerial office incompatible with membership of Parliament. General de Gaulle's view was that executive power should not emanate from Parliament or the result will be a confusion of powers which will reduce the Government to a mere conglomeration of delegated powers. Under the 1958 Constitution, the Premier of France is nominated by the President. The Premier selects his team of ministers who are appointed by the President. Article 23 of the Constitution specifically provides that the membership of the Government shall be incompatible with the exercise of any parliamentary mandate. While the Governments of both the Third and Fourth Republics were normally made up of members of Parliament, the Constitution of the Fifth Republic clearly forbids the holding of both the offices—the governmental office and the membership of Parliament.

(8) The Constitutional Council

The 1958 constitution of France creates a Constitutional Council which has been given the function of deciding on the constitutionality of governmental or parliamentary acts. It replaces the Constitutional Committee of the Fourth Republic. It has four distinct functions. First, it supervises the regularity of the election of the President of the Republic and of referenda, proclaims the results thereof, is responsible for declaring the Presidency vacant if for any reason the President cannot carry out his duties, and decides cases in which the regularity of parliamentary elections is contested (Articles 58-60). Second, it must be consulted on the conformity with the Constitution of organic laws and standing orders of both Houses before their implementation (Article 61). Third, it must be consulted by the President regarding both the existence of an emergency and the measures that he proposes to take to deal with it (Article 16). Fourth, the Council's ruling may be sought by the President, the Prime Minister, or the President of either House as to the conformity with the Constitution of an international agreement or a law about to be promulgated and on certain conflicts which may arise between the Government and Parliament regarding the delimitation of executive and legislative competence (Articles 61, 54, 41).

It may be mentioned that the Council has no power to enforce its decisions. Its opinion is merely advisory. If the President, Government and Parliament were to agree to refrain from consulting the Council on a matter where consultation is optional, then there is no means by which the Council could make its views known. The citizens cannot appeal to it nor can any court of law. Its position is thus very much different from that of the Supreme Court of the United States.

Nevertheless, on matters on which it must be consulted, or is, in fact, consulted, the Council can have and has had great influence in determining the constitutionality of a number of acts and standing orders.

(9) The Community

The concept of Community is an important innovation of the Constitution of the Fifth Republic. It is a sort of association between the French Republic and its overseas territories and departments. It is something between a Federation and a Commonwealth. It has replaced the old concept of French Union. The members of the Community have equal status. They enjoy autonomy, conduct their own administration and manage their own affairs democratically and freely. All citizens are equal in law, whatever their origin, race or religion and have the same duties. The Community consisted of the French Republic on the one hand and twelve former overseas territories on the other. These territories had participated in the constitutional referendum of September 1958. However, soon after the promulgation of the 1958 Constitution, the overseas territories, one after another, acceded to independence and, the idea of Community, as originally conceived, had ended almost as soon as it had begun. The Constitution was, accordingly, revised to make independence compatible with membership of the Community. Now a state can by a simple agreement determine the conditions on which it would become a member of the Community. All twelve States signed agreements providing for close cooperation with France in a number of fields, but only six decided to remain within the Community. The members of the Community are all sovereign States, with the right to have their own representative abroad, with their own armies and their own currency. All are members of the United Nations. The Community now is in a constitutional limbo and there is a 'Commonwealth Conference' type of contact between the seven members of the Community.

(10) Advisory and Judicial Organs

Of the two advisory bodies set up by the 1958 Constitution, one is the Economic and Social Council. It gives its opinion on the Government bills, drafts ordinances and orders and private members' bill submitted to it by the Government. It may likewise be consulted by the Government on any problem of an economic or social nature concerning the Republic or the Community. Any plan or programme of an economic or social nature has to be submitted to it for its advice. Under the Fourth Republic also there was an Economic Council which was free to study and report on any matter within its field of competence and could be consulted by the Assembly as well as by the Government. The functions of the Economic and Social Council under the Fifth Republic are somewhat changed. Its sessions are no longer public and much of its work is done in technical sections, to which outside specialists are co-opted. It is now primarily a technical adviser.

Another advisory body is the High Council of Judges and Public Prosecutors. It is presided over by the President of the Republic. The Minister of Justice is its ***ex-officio*** Vice-President. He may deputise for the President of the Republic. In addition, it consists of nine members appointed by the President of the Republic sitting for four years and re-eligible for a second term only. Its function is to advise the Government on appointments to a limited number of higher judicial posts, i.e., the judges of the quashing court ***(Cour de Cassation)*** and the presiding judges of the Courts of Appeal. It shall also give its opinion on the proposals of the Minister of Justice relative to appointments of other judges. It also acts as the disciplinary council for judges and shall be consulted on questions of pardon.

Under the Fourth Republic, the Higher Council of Judiciary had also been responsible for the general organisation of the courts of law and for ensuring independence of judges. But when political considerations started influencing the appointments, these functions were returned to the Ministry of Justice. Under the present Constitution a number of ordinances and decrees have been issued for a comprehensive reorganisation of criminal procedure, for redistribution of law courts, and for improvements in the status and training of judges, designed to improve their quality.

The function of the High Court of Justice set up under Article 67 is to try Presidents of the Republic on charges of high treason. It also tries ministers and their accomplices on charges of plotting against the safety of the State. To bring individuals before it, both Houses must pass a motion by identical vote in open balloting by an absolute majority of their members. Two changes of importance may be noted. Under the Fourth Republic, the decision to bring an individual before the court was taken by the National Assembly alone, whereas under the Fifth Republic, it has to be taken by both the Houses; second, the balloting is no longer secret.

(11) Political Parties Recognised

An important feature of the 1958 Constitution is constitutional recognition of political parties (Article 4) and their role. In India or the United States, the Constitution does not provide for any such recognition. As a matter of fact, political parties are extra constitutional growth. For the first time, the French Constitution not merely mentions parties, but acknowledges them as a normal constituent of political life. Article 4 says that "*Political parties and groups shall be instrumental in the exercise of the suffrage. They shall be freely formed and shall freely carry on their activities. They must respect the principles of national sovereignty and democracy.*" The Constitution, thus, makes respect for democracy a constitutional requirement for the formation of political parties. In other words, parties whose loyalty to France and respect for democracy is not clearly exhibited can be banned if necessity arises.

(12) Untidy, Vague and Ambiguous

The 1958 Constitution of France has been called an untidy Constitution which is in some places vague, and in others ambiguous. The Constitution does not completely describe the system of Government and has omitted provisions for a number of extremely important institutions. The electoral laws, the institutions of the Community, the composition of two Houses of Parliament, the organisation of Judiciary, the functions of the Economic and Social Council, the Higher Council of Judiciary, as well as a number of other matters are dealt with in a series of ordinances promulgated between October, 1958 and February, 1959. Over three hundred ordinances are said to have been promulgated during the intervening period. The proclamation of vast number of ordinances, some of which purely deal with administrative matters, has made the task of Constitution interpreters difficult. Further, the 1958 Constitution was drafted in private by a small Ministerial Committee presided over by General de Gaulle. It was never debated in the Parliament which has deprived interpreters of the constitution an opportunity to know the precise shade of meaning given to this or that word or article by the politicians of different parties. This Constitution was made in fact for General de Gaulle leaving him to interpret it as suited his interests. Nothing has been published on the ministerial discussions or on the opinions of the Council d'Etat so that the intentions of the Constitution-makers could be revealed. Consequently, the Government is free to adopt its own interpretation. It is because of this vagueness and ambiguity of the Constitution that General de Gaulle created his own conception of presidential powers and of the way these were to be exercised.

CHAPTER 28

THE CONSTITUTION OF JAPAN AND ITS SALIENT FEATURES

Introduction

Japan is often called the 'England of the East.' Both Japan and England have any similarities. Both are groups of s. As England is separated from Europe by sea, so is Japan separated from Asia. Both the countries followed a policy of isolation until the foreign invaders ended this policy. Both the countries had social and political changes only after industrial revolution. Both the countries have monarchy even today and both have deep faith in democracy.

Japan is situated to the east of Asia. It consists of four main islands—Honshu, Kyushu, Hokkaido and Shikoku plus numerous smaller islands. In total area, Japan is 377,815 square kilometres or one-eighth of India. Honshu is the largest island. The five big cities of Japan—Tokyo, Ngoya, Yakoshama, Kyoto and Koh are situated in this island. Japan has beautiful natural scenery.

The terrain of Japan is mostly mountainous. There are about two hundred and fifty mountains of the height of more than 2,000 metres. The biggest plain is Kyoto near the city Tokyo where 1,20,000 of people live. Nanti and Kynkei are the two other plains. These plains have fertile land. The rivers of Japan are short and swift. It has no great river valleys. The rivers have little or no value for navigation. They mostly serve as a source of hydroelectric power.

Cold Ocean current flows northward of Japan while a warm current flows southward. Fish are richly founded near the sea coastline. Fish form the main diet of the Japanese people. Fishing has been a main industry of the Japanese economy. About twenty per cent of the population is engaged in fishery.

The forests hold an important place in the economy of Japan. About eighty per cent of the mountainous terrain is covered by green forests. From these forests the building wood, fuel wood and synthetic fibre are obtained.

Japan is known for earthquakes. The number of earthquakes is 1,500 a year. There is an abundance of coal mines, but since these mines are not located in the industrial area so the generation of hydroelectric power has received great emphasis. The country was also found to be rich in petroleum but only after 1900. Japan also has big copper mines. Gold and silver are found in the southwestern part of Kyushu. Besides, zinc, tin, iron, sulphur and lead are also available. The iron produced in the country does not meet the needs of Japan. India exports a large quantity of iron ore. The nation is greatly dependent on foreign trade.

Japan is an industrialised country, yet agriculture holds an important place in its economy. About forty per cent of the population depends upon agriculture but only 13.9 per cent of the land is cultivable, the rest being mountainous. The average acreage of fields is two and a half. Rice is the main crop. There is intensive cultivation in the country as the cultivable land is less in area. An attempt is made to grow crops which ripen soon. At least two and often three crops are grown. Sericulture also holds an important place in the agriculture of the country.

The first people to settle on the islands were the Aryan who were of the Caucasic stock. The Aryans were displaced by the Mongoloids who landed in the country. In the third and fourth centuries, Japan established its relations with Korea. The art of weaving, tanning and metal work reached Japan through Korea. During this period, Japan learnt a lot from Korea and China in the field of art, education and handicrafts. Buddhism reached Japan in the sixth century through China and Korea. Buddhism has deeply influenced the customs and social institutions of the land. Besides Buddhism, Shintoism is also professed in Japan. Shintoism believes in ancestor worship. It received royal aid which was ended in 1947. Christianity also prevails in Japan. Christianity has contributed largely to the westernisation of the Japanese civilisation. The citizens enjoy freedom in the matter of religion.

Population of Japan is about twelve crores. During the last few years Japan has achieved remarkable economic progress; however, the problem of providing employment for an increasing population remains. Although Japan is considered to be the most progressive among Asian nations, yet the Japanese believe that their country has been created by God. Most Japanese are fatalist.

Although Japan is a mixture of different races as people belonging to Mongoloid, Caucasic and Negroid races live there, yet it is a nation with common language, a common culture and a common way of living. There is strong nationalism and 'in-group' feeling among the Japanese. No other country is so free from internal feuds as Japan. The Japanese are ever prepared to make sacrifices for their country. They are full of national spirit. In 1905 they defeated a great European power— Soviet Russia. In the World War II Japan fought bravely against the Allied Powers. Although Japan was defeated, yet in bravery and courage the Japanese were unsurpassed. After the war, Japan soon reconstructed its war-shattered economy and now it has acquired the status of a leading nation.

Japan today is a thriving complex of industry, commerce, finance and agriculture. The nation is in an advanced stage of industrialisation, served by a massive flow of information and highly developed transportation network. However, the economy is presently facing a recession which the country is attempting to cross over.

Development of Japan's Constitution

Chitoshi Yanaga has divided constitutional history of Japan into three periods—Pre-Feudal age, Feudal Age and Post-Feudal age. Little is known about the early constitutional history of Japan. The Japanese historians are of the view that the empire of Japan was founded by Emperor Jimmo in 660 K and since then Japan has been governed by the unbroken line of his dynasty. Jimmo is said to belong to Yamato tribe. During the ancient period the basis of Government was patriarchal. The Emperor ruled like a father over the family. He was the owner of the arable land which he used to distribute among the different families of the cultivators. The emperor exercised his powers through the tribal chieftains. Thus, royal power was decentralised which continued till 645AD. Thereafter, there came a change in the system of Government and there began the second stage of the Pre-Feudal age.

The second stage continued upto 1185. During this period Feudalism got a strong foothold in the country. Starting about the fifth century, Japan came to be increasingly under the influence of Chinese civilisation. As a result thereof, the centralised bureaucracy was established. Formerly, power was distributed among the feudal lords, but now, the Emperor centralised his powers. The reforms of 646 AD ended the patriarchal system and the Emperor began to rule like a despot. He became the source of all powers and began to rule the State as its head. Direct political power was established over the people. Confucianism and Shintoism contributed to the enlargement of the powers of the Emperor and his honour. The Emperor became the highest priest of the nation, the sovereign ruler of the country and the Chief Commander of the military services. During this period the members belonging to the Fujimara dynasty held the important offices.

Feudalism

Towards the end of the century certain circumstances conspired to bring to an end the contemporary system. The centralised bureaucracy, an institution borrowed from China did not suit the conditions. The Emperor never functioned effectively. The real power was in the hands of the bureaucracy. The people belonging to the Fujimara dynasty held the highest offices. They exercised all the powers of the Emperor in his name. Besides, the increase in the power of the Fujimara dynasty there were some other factors like the increase in the number of manors and the birth of 'samurai' class in the provinces which helped decline the power and influence of the Emperor. The increase in the number of manors affected adversely the royal revenue. Along with it, corruption in administration also grew. The central control over the provinces loosened, increasing thereby the danger to the life and property of the people. The feudal barons came to recruit armed retainers to help protect their domains. Gradually their power continued to increase. Later on, the aristocrats dissatisfied from the Fujimara administrators assumed the leadership of the 'samurai' class. The leaders belonged to the Taira and Minamoto races. But there was a feud between the two races and the Minamoto race succeeded in establishing its supremacy. Yorimoto, the head of the Minamoto race gave to himself the title of 'Shogun'. Thus, after a century of civil feuds, peace and order were established. But now the influence of the nobles came to an end and in place thereof, feudalism was born wherein, power passed into the hands of the military leaders. The system continued for seven centuries which deeply influenced the ideas, the institutions and the customs of the Japanese people. Yoritano made Kamekura his capital. Gradually the entire power passed into the hands of the Shogun who ruled with the help of powerful feudal lords. In the later half of the sixteenth century, there was a civil war between the feudal lords. Ultimately Tokugawa Iyeyashu won a decisive victory in the year 1600 and assumed the title 'Shogun' in 1603. The Tokugawa regime continued till 1867. In that year, the last Tokugawa Shogun resigned and returned authority to the Emperor.

Salient Features of the Japanese Feudal System

(1) The real power during this period was vested in the hands of the Shogun. Although work was carried in the name of the Emperor yet the Shogun was the sovereign. The Emperor used to appoint the Shogun but the Emperor had no particular role in the affairs of the nation. The Shogun consulted the Emperor but he took decisions himself. Often the people did not even know the position of the Emperor.

(2) The Shogun took help from the Samurai in his administration. The Samurai was a special class trained in the art of war. They were successful warriors and belonged to the noble class. They enjoyed several privileges. They had separate laws and separate courts.

(3) Japan was divided into several fiefs, which were under control of the feudal lords. The feudal lords were called 'Daimyos'. The Daimyos were autonomous in their administration. The people had direct contacts with neither the Shogun nor the Emperor. They regarded Daimyo their Emperor. But the Daimyo was under strict control of the Shogun. There was a well-organised department of spies who used to provide information about the activities of the Daimyo. In short, the Daimyo was free only in local matters. The matters of national importance were in the hands of the Shogun. Therefore, this age is called the age of "centralised feudalism."

(4) Japan was divided into various classes. Up the ladder there were Samurai and Daimyo. The Samurai were the warrior class while the Daimyo were the owners of the fiefs. There was no intellectual class. Below the ladder were the clergy, doctors and others.

The economy was mainly agricultural. The number of cultivators was quite significant. Forty to fifty per cent of the produce was realised from them as tax. Sometimes, they were forced to do 'begar' for public purpose.

(5) The Shogun administration was simple in structure. The Shogun was the highest officer who enjoyed supreme powers. Sometimes the actual power passed on into the hands of a Council of Elders or of some palace officials or other high officials. The management of day-to-day affairs like collecting taxes, maintaining peace and order and making people follow their religion was under the control of junior officials.

Village administration was autonomous. The villages were small. The representatives of the Shogun appointed some officers from among the rich people and old feudal lords whose functions was to represent their village in their talks with the high officers, to pronounce the orders of the Shogun, to collect the taxes, to decide the minor disputes, to maintain records, to bring in the reforms in agriculture and to keep an eye upon morals of the villagers. There also used to be a village council. A particular feature of the village administration was the device of mutual responsibility. The village was divided into groups of five families. Each group formed a unit. If a family in the unit was unable to pay its taxes in full, it was the responsibility of the unit to pay up the difference.

(6) Another feature of the Shogunate political structure was the policy of complete isolation. The Tokugawa administrators forbade all foreign contacts, except for carefully regulated trade with the Dutch and the Chinese at the port of Nagasaki. Christianity was considered a subversive doctrine and it was apprehended that if Europeans were allowed to enter the country, Christianity would spread. It was also feared that some of the feudal nobles might get powerful enough to challenge Tokugawa hegemony through an alliance with the European nations.

Thus, during the Shogunate age, Japan was a regulated feudal society which was kept away from the foreign ideas and influences. But Japan had to pay a heavy price for this policy of isolation. It could not benefit from the inventions and progress made by the western countries. With the passage of time, the Tokugawa administration and the smaller principalities had to face several financial difficulties. To overcome these difficulties they resorted to higher tax levies and forced loans. This caused discontentment among the Samurai and land-owning class. Kahin writes, "The Samurai had social standing but no wealth; the merchants had wealth but no social standing. Besides, the country had to face recurring natural disasters such as flood and there were periodic famines. The lot of the small agricultural producers became wretched. Consequently, the peasants also revolted. In brief, the "time of troubles" had come.

On the other hand, Russia and the United States were forcing Japan to abandon its policy of isolation. The Tokugawa rulers faced a dilemma. They could not abandon the policy of isolation without serious internal repercussions. On the other hand, they could not hold off indefinitely the foreign powers that possessed superior military weapons. Faced by internal difficulties and foreign pressure, the Tokugawa Shogun resigned and handed over the authority to Emperor Meiji. This transfer of power is called the Meiji Restoration. It opened the third age in the constitutional history of Japan.

Post-Feudal Period

The Meiji period represents one of the most remarkable periods in the history of Japan. During this period Japan achieved in only a few decades what had taken centuries to develop in the west—the creation of a modern nation, the growth of industries and modern political institutions. Emperor Meiji shifted the capital from Kyoto to Tokyo.

The Meiji abolished the feudal system. All the fields were transferred to the Emperor and for every province a governor was appointed. All class privileges were abolished. The common people were allowed to enter into public duty. All were declared equal before the law.

On April 6, 1868, the Emperor issued a historic document, the Charter Bath. This Charter Bath is sometimes called the 'Magna Carta' of the Japanese people. The Bath contained five principles:

(1) A council will be called to decide all measures by open discussion;

(2) Men of the upper and lower classes shall without distinction be united in all enterprises;

(3) Civil and military officers shall be in one accord and all the common people shall be so treated that they can attain their aims and feel no discontent;

(4) Old evil ways and customs shall be abolished;

(5) Knowledge shall be sought for throughout the world in order to establish the foundations of the Empire.

This Bath had two significant features: firstly, the creation of a deliberative assembly and secondly, it pointed out that the new Government would follow the programme of westernisation and that anti-foreignism would be discouraged.

After the proclamation of the Bath the Emperor began a programme of reforms in the social and political structure. In the social field the distinctions between the samurai and the common people were removed. All were made equal before law. Military was nationalised and compulsory military service was enforced. The military was equipped with the latest weapons and it was organised on the German way. Education also spread. New schools were opened and compulsory primary education was decreed. Teachers from foreign countries were invited and Japanese students were sent abroad.

In the economic field too, the nation made remarkable progress. The Government took lead in building roads, rails, telephones, telegraphs and post offices. There was growth of mineral wealth and big industries were established. The coinage system was reformed and banking system introduced. Trade with foreign countries increased and thus by the end of nineteenth century Japanese people were modernised.

In the political field several reforms were introduced. The feudal principalities were replaced by prefectures which were a part of a centralised administration. A civil service system based on the merit system was set up. A legal code and a judicial system copied from continental European models were adopted. Feudalism was abolished and Japan again became a strong monarchy.

According to Chitoshi Yanaga, the period between Restoration and Feudalism was an interlude, a transition stage which was dominated by a small oligarchy under an interim system of absolute monarchy.

During the Meiji rule, new energies were suddenly released. Before the nineteenth century ended, the country became involved in the Sino-Japanese war of 1894-95. After ten years, it became involved in the Russo-Japanese war of 1904-05. Japan emerged victorious from both. As a result of these wars Japan rejoined South Sakhalin and acquired Formosa and Korea.

In 1874, the Government, to satisfy an important group of officials, established a Senate as a legislative chamber. The Senate was mainly a deliberative body, it could not legislate. It did not consist of the elected representatives of the people but was composed only of the appointed members, the noble and official classes. But these reforms of 1874 did not satisfy the liberals. Consequently, an agitation for a Constitution gained momentum in 1877. In 1878, the Government gave some more concessions to the people to pacify the popular demand. In 1880, representative assemblies were set up elected on the basis of limited franchise for the cities, towns and villages, but this also did not silence the popular demand for the Constitution. Ultimately in October 1881, the Government in the name of the emperor promised that the Parliament will be convened in 1890 and the Constitution would be granted. The following year Prince Ito was sent abroad to study the various Constitutions. In 1883, Prince Ito returned from abroad. He was appointed as the chairman of the Bureau for Investigation of Constitutional systems. Ito was very much impressed by the Constitution of Germany. He restored the nobility as a preliminary step to the formation of the Upper House of the Japanese Parliament. The Cabinet also was modelled on the German pattern. Ito became the Prime Minister.

By 1888, the draft of the Constitution was ready and was presented to the newly created Privy Council for ratification. The Privy Council approved it with some minor amendments. On February 11, 1889 the Constitution was gifted away to his subjects by Emperor Meiji.

Salient Features of the Meiji Constitution

(1) Written and Brief

The Meiji Constitution was a written Constitution. It was about half as long as that of the United States. It consisted of seventy-six articles and was divided into seven parts. One of the reasons for its being brief was that quite large and important items, such as the House of Peers, finance, elections, succession to the throne were covered by group of organic laws promulgated soon after the declaration of the Constitution. Another reason for its being brief was that the Constitution-makers were very particular to be as brief as possible. Some of the Articles contained only one or two sentences. The Constitution was couched in so general words that in 1945 it was said that this Constitution could be interpreted and enforced in a way as to build a democratic system and that there was no need to have a new Constitution.

(2) Imperial Government

The Constitution laid emphasis on the institution of the Emperor. The very first Article read, "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." Articles 1 to 17 enumerated the powers of the Emperor's. The Emperor was the source of all authority. All laws were to be sanctioned by him. He called the session of the Diet and dissolved the Lower House. He could issue ordinances. He was the head of the executive, as such he appointed all the officers. He was the Supreme Commander of the army and navy with power to declare war, conclude treaties and make peace. The ministers were responsible not to the Diet but to him. The Emperor used to appoint the Prime Minister and other ministers were appointed by him on the recommendation of the Prime Minister. The Emperor of Japan had more powers than the King of Britain. The Emperor had vast powers and combined in himself all sovereignty. Still the Emperor reigned but did not rule. He exercised his powers in consultation with the ministers and the Privy Council. According to Ogg and Zink, "All these functions were not performed by the Emperor himself but were done in his name. The Emperor had little hand in the formulation of policy and execution of public affairs." Dr Fujisawa writes, "The Emperor of Japan reigns but does not rule." He hardly if ever took a step against the ministers. However, it cannot be denied that the Emperor had a far greater moral power and influence. The people worshipped him and considered his person as sacred and inviolable. He represented and symbolised the whole nation. According to Chitoshi Yanaga, "He was occasion arose without actually involving himself as a mediator." in a position to give admonition, encouragement, or warning as the

(3) Fundamental Rights

The second chapter of the Constitution enumerated the fundamental rights of the Citizens. Articles 18 to 32 dealt with the rights and duties of the Japanese people. No Japanese subject could be arrested, detained, tried or punished except according to law. Their property was protected. They had freedom of religion. They had the right to form associations and hold public meetings. They had also the freedom of speech and expression.

But these rights were not inviolable. They were subject to many limitations. According to Article 20, the people could enjoy these rights, "subject to the restrictions placed by law". The courts did not have the Right of judicial review. There was no provision for the writ of *habeas corpus.* Thus, the fundamental rights of the people were limited and not absolute.

The Constitution also mentioned some of the duties of the people two of which were important. These were the duties to pay taxes and serve in military.

(4) Bicameral Legislatures

Articles 33 to 56 of the Constitution described the organisation and powers of the Diet. The Diet consisted of two chambers, the House of Peers and the House of Representatives. Article 34 described the organisation of the House of Peers. It consisted of four hundred members who belonged to the noble and higher ranks of the society. The House of Representatives consisted of four hundred and fifty members elected directly by the people for four years. The tenure of the House of Peers was seven years. The voting age was fixed at twenty-five. In addition to the age qualification, a voter must also be a taxpayer, paying at least 15 yen annually in direct taxes. Only males were entitled to vote.

The Diet was to meet yearly and the duration of the session was fixed at three months. As compared to the British Parliament the Japanese Diet was less powerful. One of the reasons was that most of the Government work was done through decrees rather than through Acts. Moreover, it could not reduce the demands nor could increase them without the assent of the ministry. There was also a provision that if the Diet failed to approve a budget in any one year, the Government could spend according to the budget of the last year. Besides it, the ministers were not responsible to the House. Thus, the Diet was subordinate to the executive and did not have an important place. It was reduced to a low position by the Cabinet.

(5) Privy Council

Article 56 of the Constitution provided for a Privy Council to deliberate upon important matters of the state. It was an extra institution between the Cabinet and the Emperor. It consisted of about twenty-six members who used to be big businessmen, diplomats, generals, admirals and other men of distinction. The ministers were the ex-officio members of the Privy Council. The members were appointed for life. The Council had to approve the emergency decrees, the declaration of war and peace. It advised the Emperor on the matters relating to throne and royal family. In case of a disagreement between the Cabinet and the Privy Council, the Emperor accepted the advice of the Privy Council. The members of the Council were conservative and orthodox and so they placed obstacles in the development of democratic government. Gradually the Council reached the peak of supremacy.

(6) The Cabinet

The Constitution was silent about the Cabinet. The Constitution only mentioned that the ministers will give advice to the Emperor and will be responsible for it. In 1885 on the formation of the government, a Cabinet was formed and it continued to exist. The Prime Minister was appointed by the Emperor on the advice of the Council. It was not obligatory for him to appoint the leader of the majority party. But after 1920 when the system of party government reached its zenith, the leader of the majority party was appointed the Prime Minister. The Prime Minister selected his colleagues who were appointed by the Emperor. It was not necessary for the ministers to be the members of the Diet. The Cabinet met once a week. The ministers gave advice to the Emperor. They were responsible to him. The Emperor could remove a minister for incapacity. The House of Representatives could not compel the cabinet to resign. The powers of the cabinet were limited both in theory and practice. The Prime Minister did not enjoy the position of his counterpart in Britain. Yet the Cabinet was the main organ.

(7) Rigid Constitution

The Constitution laid down a rigid method for its amendment. The proposal for amendment could be submitted only by an imperial order. The Diet discussed and voted upon the proposal, subject to the provision that for the opening of debate at least two-thirds of the whole numbers of the members were present, and no amendment could be passed unless a majority of not less than two-thirds of the members present was obtained. The Constitution conferred the right of initiating the amendment to the Emperor because he was the sole author of it. It may be noted that not a single amendment was ever made to this Constitution. It was replaced by an altogether new constitution in 1946.

The Meiji Constitution remained in force for fifty-eight years but it was never amended. During this period Japan made an all-round progress. On the one hand, it made rapid economic progress, and became a strong empire while on the other, democratic and parliamentary institutions were established in the country. The people began to take active interest in the political affairs and liberal tendencies grew. Though the power was in the hands of the big business magnates and generals, yet the people during this period got adult franchise and political rights and Japan became a modern nation. According to a writer, the Meiji Restoration was like the bursting of a dam behind which had accumulated the energies and forces of centuries. Japan achieved in only a few decades what had taken centuries to develop in the West—the creation of a modern nation, with modern industries, modern political institutions and a modern pattern of society. The surge and ferment caused by the sudden release of these energies made them felt overseas. Japan emerged victorious in the Sino-Japanese war of 1894-95 and the Russo-Japanese war in 1904-05. When Japan entered the World War I, it was one of the big powers of the world.

In 1931, Japan occupied Manchuria. In May, 1932 a group of army and navy officers forced their entry into the Prime Minister's residence and killed Prime Minister Inuki Tsuyoshi. There were other acts of violence. The party rule came to an end in Japan and power passed on in the hands of the military leaders. They started extending the territories of Japan. They did not accept the resolution of the League of Nations regarding the occupation of Manchuria. The United States also failed to bring an agreement. On December 17, 1941, Japan entered the World War II. During the war period a policy of regimentation was followed, but there was no change in the organisation of the Government. The Diet, Cabinet and the Privy Council continued in existence. Japan was defeated in the war and the Allies occupied it under the terms of the Potsdam Declaration, 1945. General MacArthur was appointed the supreme commander of the Allies in Japan. MacArthur was asked to work for two objectives: first, that Japan should not become in future a menace to the world peace and security and secondly, that a peaceful and responsible Government should be established in Japan. General MacArthur abolished the army control and stopped military education in the schools. He asked Prime Minister Shidehara to prepare a new Constitution in place of the Meiji Constitution. The Prime Minister was of view that there was no need for a new constitution and that the old Constitution may be amended to suit the changed conditions. But he was rebuked by MacArthur for his view and ordered to prepare a new constitution. Prime Minister Shidehara appointed a Constitution Committee with Matsumoto Togi as its Chairman. Dr Togi prepared a draft but it was rejected by the Supreme Commander as unsatisfactory. Accordingly, he asked the Government section of his headquarters to work and quickly prepare a draft. The Government section worked swiftly and within a few weeks prepared a draft. General MacArthur told the Government that it should place the draft before the people telling them that it was prepared by the Government. The Emperor issued a decree. On October 7, 1946, the draft of the Constitution was passed by both the Houses. On November 3 , the birthday of Emperor Meiji, it was assented to by Emperor Hirohito and became effective on May 3,1947. In the words of Maki, "It was the occupation that originated, directed, and obviously controlled the drafting, the content, and the process of approval of the new Constitution." The present constitution is also called the Shova Constitution which replaced the Meiji Constitution.

GENERAL FEATURES

The Meiji Constitution remained in **V**force from November 1890 to May 1947. On May 13,1947 the Shova Constitution came into force. This Constitution, as we have seen in the last chapter, was prepared by the headquarters of General MacArthur and so it was a constitution forced on the people of Japan by MacArthur.

The following are the main features of the new Constitution.

Written Constitution

The Shova Constitution has been termed as the "Constitution of Japan" whereas the Meiji Constitution was named as the "Constitution of the empire of Japan." Moreover, the terms "empire" and "imperial" are used less frequently than in the old Constitution. The Shova Constitution consists of 11 chapters and 103 Articles. This Constitution is longer by at least one-third than the old one. The Constitution is not basically of Japanese origin but is essentially of the western origin. The new Constitution has derived much from the American, British and international principles whereas the old Constitution was inspired by the German and Prussian Constitutions. "The Preamble to the Constitution," says Chitoshi Yanaga, "reminds the reader of the ideas and language of such historic documents as the Declaration of Independence, the Federalist papers, the Preamble to the Constitution of USA, the Gettysburg Address and even the Atlantic Charter". The Constitution opens a new chapter in the history of Japan.

Sovereignty of the People

The Constitution vests sovereignty with the people whereas the Meiji Constitution was a gift to the people. The Constitution of 1947 expressly declares that it was the act of the Japanese people and that the Emperor was the symbol of the State and derived his powers and position from the will of the people. The Preamble reads:

"We, the Japanese people, acting through our duly elected representatives in the National Diet do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people and the benefit of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all Constitutions, laws, ordinances and rescripts in conflict therewith."

According to the new Constitution, the Emperor is authorised to perform certain "acts of State" but is specifically forbidden to exercise "power related to the Government".

In his first address from the throne, Emperor Akihito pledged, "and that I shall observe the Constitution of Japan and discharge my duties as the symbol of the State and of the unity of the people'. Prime Minister Kaifu conveyed people's thanks for the Emperor's pledge.

Rigid Constitution

The Constitution of Japan is rigid, and the procedure proposed to amend it is tough. Chapter IX Article 96, describes the procedure of amendment. It provides that the amendment to the Constitution can be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House. Thereafter, they shall be submitted to the people for ratification. Amendments so ratified by the people shall be an integral part of the Constitution. Under the Meiji Constitution the power of initiating the amendment resided in the Emperor. But now the Diet proposes the amendment and the people ratify it. No amendment has so far been made in the Constitution.

Renunciation of War

The Constitution declares that Japan will not go to war and will not use force or threaten use of force for settling international disputes. The Preamble reads, "We, the Japanese people, have determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of Government ... we the Japanese people desire peace for all time and are deeply conscious of the high ideas controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honoured place in an international society striving for the preservation of peace." Article 9 reads, "Aspiring sincerity to an international peace based on justice and order, the Japanese people for ever renounce war as a means of settling international disputes." Japan will not maintain land, sea and air forces. But it does not imply that Japan cannot use arms for its defence and security. What MacArthur had in his mind was to abolish forever the power of Japan as a rival to the United States in the Far East. War and the threat or use of force as means of self-defence is certainly permissible.

Limited Monarchy

The institution of Emperor is based on old traditions. Under the old Constitution the Emperor was the source of all authority but under the new Constitution he is the symbol of the State and the unity of the people. The sovereignty resides with the people. The Emperor is merely a constitutional head. All the acts of the Emperor are to be performed "on behalf of the people" and "with the advice and approval of the Cabinet". All the imperial property is the property of the State, with all the expenses of the household to be met from the annual Diet appropriations. The Emperor is no longer sacred but is a trustee of the people. Now the sovereignty of the Emperor has been abolished. He performs his acts according to the Parliamentary conventions. Like his counterpart in England he only reigns and does not rule.

Parliamentary Government

The new Constitution of Japan establishes a Parliamentary Government of the British pattern. The Diet is the highest organ of the State and is the sole law-making body. The Prime Minister is appointed by the Diet and along with his Cabinet is responsible to it. The Cabinet has to resign or make an appeal to the nation on an adverse vote or a vote of censure by the House of Representatives. The Meiji Constitution had not clearly defined the responsibility of the Cabinet. Article 55 implied that the ministers were responsible to the Emperor and not to the Diet.

Unitary Government

The Constitution of Japan is unitary whereas that of America and India is federal. The provinces have received their powers from the centre and the devolution of authority has been done for the efficiency of administration and not for any federative principle. The centre may at any time change these powers. There is only one law-making organ for the whole of Japan. In a Federation the powers of the Federal Government and the provinces are clearly demarcated and none can encroach upon the other. But in Japan the provinces can exercise only those powers which have been bestowed upon them by the central Government. There is no division of powers in Japan but there is centralisation.

Bicameral System

The Diet is the highest law-making organ of the State. It has two chambers. The Upper Chamber is called the House of Councillors. The Lower

Chamber is called the House of Representatives. The House of Councillors contains two hundred and fifty-two members who are elected for six years; one-half of whom retire after every three years. There are five hundred and twelve members in the House of Representatives who are elected for four years. The money bills cannot be introduced in the House of Councillors, but it can make amendments to such bills or reject them. In case of a deadlock between the two Houses, if the House of Representatives pass the bill by a two-thirds majority for the second time, it will become an Act. Thus, in legislative matters the House of Representatives enjoy primacy.

End of Dualism

Before the implementation of the new Constitution the Supreme War Council had brought about dualism in the operation of the executive branch. The Supreme War Council was composed of important officers of the armed forces who were not subordinate to any civil authority. They were responsible only to the Emperor. The Emperor used to take advice from both the Cabinet and the Supreme War Council. In case the advice of the Cabinet differed from the advice of the War Council, the Emperor accepted the advice of the War council. The War Council was not the creation of the Constitution, it was an extra-constitutional growth. The War Council had overshadowed the Cabinet and this had led to the growth of military control over Government.

Under the new Constitution this dualism has been abolished. The military is now under the civil Government and there is no possibility that in future the militarists will capture the political power. Article 60 expressly states that the Prime Minister and other ministers shall be civil officers. There is no provision in the Constitution for the exercise of the military power outside the Cabinet.

Fundamental Rights

Chapter III of the Constitution enumerates the various rights guaranteed to the people of Japan. The Constitution declares these rights to be "eternal and inviolate". The Meiji Constitution too had given some fundamental rights but they were, in fact, not rights because no court could declare an Act or the decree of the Emperor as unconstitutional. The courts did not enjoy the power of judicial review. The present Constitution defines the fundamental rights elaborately. It enumerates all those rights which are generally guaranteed by the other liberal Constitutions. Of the one hundred and three Articles of the Constitution, thirty-one Articles are contained in this chapter. In this chapter all the important Rights such as the right to equality before law, abolition of discrimination, right to franchise, right to freedom of religion, press, right to education, right to assemble, etc., are included. The judiciary has been given the power to protect these rights.

Article 97 reiterates that the Fundamental Human Rights guaranteed by the Constitution "are fruits of the age-old struggle of man to be free, they have survived the many enacting tests for durability and are compared upon this and future generations in trust, to be held for all times inviolate".

The Constitution also enumerates three duties of the citizens: (i) the obligation to provide education to all boys and girls under their protection; (ii) the obligation to work; and (iii) the obligation to pay taxes.

Independence of Judiciary

The occupation authorities after the World War II introduced several reforms in the judicial system of Japan. Article 76 declares that judicial power belongs to the Supreme Court. There shall not be established any administrative tribunal. Judicial powers will not be conferred on any executive organ. The Supreme Court is independent of both the executive and legislature. The Constitution stipulates that the executive cannot remove the judges. They can be removed only by impeachment. The Supreme Court is empowered to declare any ordinance, law or executive decree as unconstitutional in case it violates the spirit of the Constitution. Thus like the American Supreme Court the Supreme Court of Japan enjoys the power of judicial review. Under the Meiji Constitution the court did not have the power of judicial review. It was subordinate to the Emperor and could not declare his orders or laws unconstitutional.

Adult Suffrage

The new Constitution of Japan provides for adult suffrage. The Meiji Constitution did not make a provision for it. Before the war period, suffrage was limited to men of twenty-five years of age or above provided they paid at least 10 yen annually in direct taxes. The new Constitution removes all such conditions and all men and women of the age of twenty years or above enjoy the right to vote. There is no property qualification. Now women in Japan enjoy equal rights.

Supreme Law

Chapter X of the Constitution declares that Constitution is the supreme law of the land. In Article 97 it has been stated that there shall be no violation of the fundamental rights guaranteed to the citizens. Article 90 provides, "This

Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other Act of Government or part thereof, contrary to the provisions hereof, shall have legal force or validity." Article 99 states, "The Emperor or the Regent as well as Ministers of State, members of the Diet, Judges and all other public officials have the obligation to respect and uphold the Constitution."

Local Autonomy

Finally, the Constitution introduces the principle of local autonomy, Article 93 provides that the "local public entities shall establish assemblies as their deliberative organs", and that "the Chief Executive officers of all local public entities, the members of their assemblies, and such other officials as may be determined by law shall be elected by direct popular vote within their several communities". The Local Autonomy Act 1947, provides for the exercise of initiative and recall by the voters of local entities. The prefectures and city, town and village municipalities have been granted extensive powers of local Government.

To conclude, the new Constitution of Japan is a political statement of the values which were selected to guide post-war reconstruction, abolition of militarism, revival of democratic institutions and a respect for basic human rights. It is more liberal and democratic than the Meiji Constitution. The sovereignty of the Emperor has been abolished and in place thereof, the legislature has been declared sovereign. The fundamental rights of the people are justiciable. The Supreme Court has the power of judicial review. The most revolutionary part of the Constitution is Chapter II wherein Japan has renounced war. In this Constitution an attempt has been made to blend the presidential system of the United States with the parliamentary system of Great Britain; but it has borrowed more elements from the British system. The Allied powers considered the British pattern more suitable to Japan.

The vision of those who drafted the Constitution of Japan and the sense oi continuity of those who have implemented it is apparent from the fact that there has not been a single constitutional amendment in sixty-one years, whereas the Indian Constitution has been amended more than one hundred times in a lesser a period of fifty six years.

CHAPTER 29

THE CONSTITUTION OF CANADA

Introduction

Canada was founded by the French in 1608 and ruled as a French colony till 1763. In 1763, France surrendered it to Great Britain through the Treaty of Paris resulting in the end of the Seven Years War in Europe. In 1791, Canada was bifurcated into two parts, Upper Canada and Lower Canada. For each part a representative Assembly was earmarked and an executive headed by the Governor. The British population mostly inhabited the Upper Canada and the French population settled in Lower Canada. The Act of 1791 however, failed to satisfy both the British as well as French population. Consequently, constitutional deadlocks rocked Canada. Jealousies between the French and the British in the Lower Canada reached a climax. In the Upper Canada a privileged class dominated the administration and the inhabitants were keen to get rid of it. In 1837, rebellion broke out in both the parts of Canada. The British Government thought it advisable to change the constitutional set-up of the country. Hence, they sent Lord Durham to report on the situation. On the basis of his report, the British Parliament passed an Act in 1840, uniting the two provinces of Lower and Upper Canada and conferring on it a responsible Government.

The Union Act of 1840 changed the Canadian political structure altogether. A unitary Government with a bicameral legislature, comprising an Assembly and a Council was established. Upper and Lower Canada were accorded equal representation in the Assembly. The executive was to be responsible to the Assembly. The Governor was reduced to a mere constitutional figurehead. The Act could not satisfy the British and the French population of Canada. The hegemony of the British majority in the Assembly was an eyesore to French. Moreover, it was also difficult to reconcile the conflicting interests of the two groups due to racial differences and the scattered settlements. Hence, a federal structure was considered suitable. The provinces welcomed this idea of a Federation.

A conference comprising delegates from various provinces was convened at Quebec on October 10, 1864. The conference framed a federal draft emphasising the importance of a Federation for Canada and passed seventy-two resolutions.

The draft so prepared by the conference was approved by the legislature of the provinces. It was later embodied in a bill which was enacted by the British Parliament as the British North America Act of 1867. It is this Act which established a Federation in Canada and conferred upon it Dominion status. Alexander Brady remarks, "The significance of a Confederation is that it provided an instrument to Government which enabled the French while retaining their distinct national life to become happy partners with the British and attain a Canadian super nationality embracing a loyalty extending beyond their own group to that of the Dominion as a 'whole'. To begin with, Canada consisted of only four provinces—Ontario, Quebec, New Brunswick and Nova Scotia. (The pre-Confederation province of Canada became the provinces of Ontario and Quebec). New Found land became its tenth province in 1949. Five provinces, two territories, were added during the period 1867-1914. Canada moved fast towards self-Government. The period between 1914 to date is marked by constitutional advances which revolutionised the relationship of Canada to the British empire. Canada today is an autonomous community within the Commonwealth of Nations, equal in status and is in no way subordinate to any other in any aspect of its domestic or external affairs. This change was brought about by the Imperial conferences held from time to time. The Balfour Declaration defined the position of the Dominion and the same was affirmed by the Statute of Westminster, passed in 1931. Professor C F Strong has given a graphical account of constitutional evolution in Canada in the following words: "The Dominion of Canada was established in 1867 by the British North America Act which applied originally to a Federation of four provinces, a number now increased to ten. This Act with its subsequent amendments is popularly regarded as the Constitution of Canada, although in a wide sense, the Constitution includes a number of other statutes ... as well as usages and conventions

Geographically speaking, Canada constitutes the northern half of the North American continent (except Alaska). It is the largest of the Dominions of Commonwealth. It has a land area of 9,205 square kilometers in thousands km, over forty times the area of the United Kingdom. About 24,200 people in thousands inhabit this land. The population is heterogeneous in race, religion and language. Fifty-two per cent of the total population is of British origin, twenty-eight per cent of French and four and a half per cent of German birth. Twelve per cent belong to the diverse European nationalities and three per cent are of Negro and native Indian stocks. In spite of these social diversities, national feeling is inculcated in an average Canadian.

Economically, Canada is one of the world's main sources of wheat. She is the principal source of nickel in the world. Huge mineral deposits have recently been discovered in Canada. Uranium ore mine in North Canada is of vital significance in this atomic age. Pulp and paper are the most important forest products. Canada is the largest producer of newsprint in the world, providing close to Government of the world total. Ottawa is the capital of Canada.

Constitution Act 1982

The British North America Act, 1867, was the instrument that brought about the new nation into existence. It was an Act of the British Parliament which alone could amend it. In other words, if Canadians wanted an amendment to their Constitution, they had to ask a foreign Parliament to legislate changes in their Constitution which was an anchronism for a fully autonomous country. Therefore, a feeling arose that Canada should be able to amend its Constitution itself, without even the formal intervention by the British Parliament. True, that Parliament always passed any amendment asked for by the Canadians, but more and more Canadians felt this was not good enough. The whole process should take place here. The Constitution should be "patriated", brought home.

Attempts to bring this about began in 1927. Till 1981, they were foiled, not because of any British reluctance to make the change but because the Canadians among themselves could not agree on a generally acceptable method of amendment. Negotiations between the federal and provincial Governments in 1927, 1931, 1935, 1949, 1960, 1964, 1971, 1978, 1979 and 1980 ended in disagreement. This impasse was ended in December, 1981 when the Senate and the House of Representatives, with the approval of nine provincial Governments (Quebec Government excluding) passed the necessary Joint Address to the Queen, asking that the British Parliament pass the Canada Act, and patriate the Constitution.

The British Parliament acted promptly and passed the Constitution Act on March 25,1982, which received the Queen's assent on March 29, exactly one hundred and fifteen years to the day Queen Victoria had given her assent to the British North America (BNA) Act, which created the Canadian Federation.

The Constitution Act, 1982, which is the final British Act, terminated the British Parliament's power over Canada. This Act was proclaimed in Canada achieving thereby the "patriation" of the Constitution. Under the Constitution Act, 1982, the British North America Act^and its various amendments (23 in number) have become the Constitution Acts, 1867-1975. The Constitution Act, 1982 has made four big changes in the Canadian Constitution:

(1) It has established four legal formulae for amending the Constitution. Till 1982, there had never been any legal amending formula.

(2) It has "enjrenched" certain parts of the written Constitution, that has placed them beyond the power of Parliament or any provincial Government.

(3) It sets out a Charter of Rights and Freedom that neither Parliament nor any provincial legislature acting alone can change.

(4) It gives the provinces wider powers over their national resources.

FEATURES OF CONSTITUTION

The Constitution of Canada consists of many laws as well as political conventions and judicial practices. But its main document is a British law, the British North America Act (BNA) of 1867. This Act has been amended twenty-three times in one hundred and fifteen years, the last amendment being the Corjstitution Act of 1982. E.A. Driedger rightly remarks, "In Canada there is no document that purports to set out the complete laws pertaining to the country's Government. The constitution ... consists, in part, of written material and in part in convention and customs." The American Civil War of 1861 which synchronised with the years when federal idea was taking its shape in Canada also left indelible imprint on the Canadian Constitution. The Constitution, thus, is an amalgam of British and American Constitutions. It adopts federal idea from the USA and parliamentary democracy from Great Britain.

Salient Features

(1) Written

The Canadian Constitution is mostly written as British North America Act is its very base. Besides, the amendments effected in it from time to time; the statutes passed by the British Parliament expressly referred to Canada, viz. colonial laws, Validity Act, the Statute of Westminster 1931, and the Balfour Declaration; Abdication Act 1936; the British Orders-in-Council such as orders admitting the North West Territories, British Columbia and others to the dominion of Canada; the Constitutional Laws enacted by the Canadian Parliament, viz. the House of Commons Act, Alberta and Saskatchewan Acts, Bill of Rights of 1960, and several Acts passed by the Canadian Parliament, namely, those creating provinces and changing their boundaries; the Act of 1875, establishing Canadian Supreme Court, Acts relating to the executive Council, the legislation and elections form the written part of the Constitution. In short, the written part of the Canadian Constitution, unlike that of the American, is not a single document. It is a collection of twenty documents, thirteen Acts of the British Parliament, seven of the Canadian and four British Orders-in-Council.

The unwritten part of the Constitution is discernible through conventions which have played a vital part in the evolution of the Canadian Constitution. For instance, the relations of the Cabinet to the Governor-General, the office and the position of the Prime Minister, the provisions concerning the ministerial responsibility are the outcome of conventions which have converted Canadian autocracy into a democracy. Dawson is, therefore, of the opinion that it is a convenient but far from accurate statement to say that Canada has a written Constitution.

(2) Rigidity-cum-Flexibility

The British North America Act was silent regarding amendment of the Constitution. It contained only a provision that the provinces were authorised to amend their Constitutions though they too could not effect changes in the affairs of the Lieutenant Governors. Thus, originally the Constitution could be amended by the British Parliament on an address presented by the Canadian Parliament to His Majesty, the King of UK. Since 1949, the position underwent some changes. The Parliament of Canada was empowered to legislate with respect to constitutional matters and amend the Constitution of Canada, except legislative authority of the provinces, the rights and privileges of the provincial legislatures and Government and schools, the use of the English and the French languages and the term of the House of Commons. The Constitution Act, 1982, has now laid down the amending procedure in details. It has established four legal formulae on processes for amending the Constitution. Under the first formula, amendments must be passed by the Senate and the House of Commons, and by the legislature of every province. This gives every single province a veto. Under the second formula, amendments must be passed by the Senate and the House of Commons, and by the legislatures of two-thirds of the provinces with at least half of the total population of all the provinces. The seven provinces needed to pass any amendment would have to include either Quebec or Ontario. Under the third formula, amendments dealing with matters that apply to one province, or to several but not all provinces must be passed by the Senate and the House of Commons and by the legislature or legislators of the particular province or provinces concerned. Under the fourth formula amendments can be made by an ordinary Act of the Canadian Parliament. Thus, the Canadian Constitution may be termed as flexible to the extent that some amendments can be made by an ordinary Act of the Parliament of Canada, otherwise it is a rigid Constitution since under the first three formulae, provinces have been associated with the amending process.

(3) A Federal Constitution

The British North America Act of 1867 and certain subsequent amendments set up a federal structure in Canada which is evident from the following facts:

(1) The powers have been divided between the Dominion and the provincial Governments. The latter have been vested with exclusive legislative control over a list of specified subjects. The Dominion (centre) possesses exclusive legislative control over the rest.

(2) The Governments of Dominion and provinces are distinct in personnel. Neither of the two Governments can alter the constitution so far as the division of powers is concerned.

(3) The Canadian Supreme Court is equipped with the ultimate authority to resolve the conflicts of jurisdiction between the centre and the provinces. It is to maintain the distribution of powers between the Federation and the provinces and act as a saviour of the Constitution. This reflects supremacy of the Constitution—a cardinal feature of the Federal Constitution.

(4) Amendments to the major parts of the Constitution cannot be made without the consent of the provinces.

Though it is a Federation, strong centralising tendencies are discernible in it. This is obvious from the following facts:

(i) The scheme of distribution of powers is such that it makes the centre strong.

(ii) The central Government exercises numerous powers over the provinces and their Governments. The Governor-General may disallow a provincial act within one year after the receipt of the act from the governor of the province. This vests a sort of veto power with the Governor-General.

(iii) The central Government can appoint and remove the Lieutenant Governors in each province. It can instruct the Lieutenant Governor to withhold his assent to provincial bills or reserve them for the consideration by the Governor-General. The Governor-General might withhold his assent to such reserved bills if he deemed fit.

(iv) All important judicial appointments are vested with the centre.

(v) The members of the Senate are appointed by the Prime Minister. Equal representation has not been provided to each province in the Senate as in the USA. In other words, the Senate is not the guardian of provincial interests.

(vi) The residuary powers which in the USA rest with the states have been earmarked for the Dominion Government. Keeping in view these centralising tendencies, K. C. Wheare remarks, "... It is hard to know whether we should call it a Federal Constitution with considerable unitary modification. It would be straining the federal principle too far ... I prefer to say that Canada has a quasi-federal Constitution." Professor Kennedy on the other hand emphasises that "Canada is a Federation in essence" on the following grounds:

(a) The Dominion Parliament is not a delegation from the British Parliament or from the provinces. It possesses full and complete power over its sphere of jurisdiction;

(b) The provincial legislatures are not a delegation from the British Parliament.

They possess plenary authority within limits prescribed by the Constitution;

(c) The provincial legislatures are not delegations from the Dominion Parliament and their status is hardly analogous to municipal bodies;

(d) The provinces enjoy independence. Hence, Kennedy remarks, "Both Governments exercise coordinate authority and are severally sovereign within the sphere specifically or generally or by implication constitutionally granted to them."

An analytical appraisal of the present position of Canadian Federation however, reveals that today the Canadian provinces enjoy powers greater than those of the American states, though Canada opted for a federal structure with the scales highly titled in favour of the central authority. Moreover, the unitary elements have not come in conflict with the federal principle. The power of disallowing provincial legislation is rarely used and is confined to those acts which abrogate the principle of legislative power and contravene the interests of the Commonwealth. A Lieutenant Governor is no longer a tool in the hands of the Central Government. One can agree with the words of K.C. Wheare, "... although Canadian Constitution is quasi-federal in law, it is predominantly federal in practice ..."

(4) Equalisation

The Constitution Act of 1982 contains a provision which proclaims that (i) the national Government and Parliament and the provincial Governments and legislatures "are committed to promoting equal opportunities for the well-being of the Canadians, furthering economic development to reduce disparities in opportunities, and providing essential public services of reasonable quality to all Canadians"; and (ii) the Government and Parliament of Canada "are committed to the principle of making equalisation payments to ensure that provincial Governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

The 1982 Act, also provides that the Charter shall be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada".

(5) Parliamentary Government

The Canadian Constitution is based on British Parliamentary model. The usages and conventions have gradually transformed the Canadian monarchy into a Parliamentary democracy. The Governor General is the nominal executive head. The Prime Minister, the leader of the majority party in the House of Commons, is the real head of the Government. The Governor General acts on the advice of the Prime Minister. The ministers can be ousted by a vote of no-confidence by a majority in the House of Commons. The provinces also follow the parliamentary system of government.

(6) Supreme Court

The Supreme Court is the highest judicial tribunal in the country. Unlike the USA and Australia, lower federal courts do not exist in Canada. The provincial courts like the Indian High Courts hear the disputes relating to federal and provincial laws. The Supreme Court can declare the laws passed by the Dominion and provincial legislatures unconstitutional, if they contravene the provisions of the Constitution. The Supreme Court of Canada is not as powerful as that of the United States. Originally it consisted of a Chief Justice and five other judges. The number of judges went up to nine including the Chief Justice.

(7) A Fully Sovereign State

Though Canada enjoys a Dominion status, it is a fully sovereign State for all intents and purposes. The Statute of Westminster of 1931 recognises the sovereign status of Canada. It is no longer a colony but is a sovereign State. It exercises full and independent control over its internal and external affairs. The Constitution Act of 1982, has "patriated" the Constitution, terminating thereby the power of the British Parliament over Canada. It is a full-fledged member of the United Nations and owes responsibility for her acts before the highest bar of world public opinion.

(8) Bilingualism

The BNA Act also established a limited official bilingualism. The members of the Parliament may use either English or French, the journals of both the Houses are kept in both the languages and either language may be used in any pleading or process in courts set up by Parliament. In 1969, the Parliament adopted the official languages Act, which declares that English and French enjoy equal status and are the official languages of Canada for all purposes of the Parliament and Government of Canada.

(9) A bicameral legislature

The Canadian Parliament is bicameral; the House of Commons is its lower House and Senate the upper. The Lower House is a directly elected chamber whereas the Senate is a nominated chamber. The Lower House which originally consisted of 181 members now comprises 282 members whereas the Senate which originally consisted of 72 members now comprises 104 members. The Canadian Senate is a powerless body. It has become a mere recording chamber and a 'me-too' machine and a 'house of echoes'. Sir Foster remarks, "Who in the street wants to know what is the opinion of the Senate upon this or that question? Who in the press really takes any trouble to know whether the Senate has any ideas and if so what they are upon any branch of legislative concern or upon conditions which require the last and most united work of all in order to arrive at a successful conclusion."

(10) Charter of Rights and Freedoms

The BNA Act did not provide any specific protection for fundamental rights like freedom of worship, of the press and of Assembly. The Parliament adopted a Bill of Rights in 1960 and later adopted human rights legislation prohibiting discrimination as in area of federal jurisdiction. The Constitution Act of 1982, made the most important contribution by adding a Charter of Rights and Freedom in the Canadian Constitution. Although Canadians have traditionally enjoyed extensive human rights, few of these rights were written into the Constitution. There was also no guarantee that certain fundamental freedoms and rights could not be taken away or abused by the Government. Incorporating the Charter into the Constitution makes it much more difficult for any Government to tamper with basic human rights and freedom. The Charter gives the individuals the power to appeal to the courts if they feel their rights have been infringed upon or denied.

The liberties spelled out in the Charter include:

(i) ***Fundamental freedom*** (of conscience, thought, appeal, peaceful Assembly, association).

(ii) ***Democratic rights*** (The right to vote, the right to be elected).

(iii) ***Legal rights*** (The right to be secured against unreasonable seizure or search, to be informed promptly of the reasons for arrest or detention, and to be represented by a lawyer, and the right to a public trial by an impartial court).

(iv) ***Mobility rights*** (to enter, remain in, or leave Canada or any province).

(v) ***Equality rights*** (no discrimination on grounds of race, religion, ethnic or national origin, sex, age, or mental or physical disabilities).

(vi) ***Official language rights.***

(vii) ***Minority language education rights.***

All these rights are however, "subject to such reasonable limits as can be demonstrably justified in a free and democratic society". What these limits might be, the courts will decide.

Provision of Referendum

The Constitution provides for referendum on matters of vital political importance. A 60-point constitutional reforms formula, initiated by the conservative Government of Brian Mulroney in conjunction with the other major national political parties, was put to vote through referendum in October, 1992 and rejected by the Canadians by a majority vote. On October 30, 1995, the French-speaking people of the Canadian province of Quebec resorted to referendum to decide regarding sovereign status of the province. However, they lost by a narrow margin. In 1980 also, such referendum had taken place and the move had failed by a much bigger margin. In fact, Canada saved itself from dismemberment on account of an emotional appeal of Canadian Prime Minister Jean Chretian. He remarked, "The end of Canada will be nothing less than the end of a dream, the end of a country ..." The vote for separation would have left Canada in a political mess which might have further led to economic uncertainty.

It can be concluded that the framers of the Canadian Constitution made the best use of the British and the American models and conceived of a model best suited to the political circumstances and environments of the country.

THE JUDICIAL SYSTEM

Canada has an integrated judicial system though there are two sets of courts—the provincial and the federal. The provincial and federal courts administer justice in their respective areas.

The Provincial Courts

The provincial courts are established by provincial legislation. Though their names vary from province to province, nevertheless, their structures are roughly the same. The judges of the provincial courts, from county courts up, are appointed by the Governor General on the advice of the Cabinet. The judges hold office during good behaviour and retire at seventy-five. Their salaries, allowances and pensions are fixed by the Dominion Parliament.

The provincial courts hear cases concerning both provincial and federal laws. They also hear election petitions and entertain appeals from the lower courts. The provincial Government can also seek advice on any point of law from the provincial Supreme Court. The Provincial Supreme Courts and also other courts work under both Dominion and provincial control. The province constitutes, organises and controls the courts and determines the procedure in civil matters while the Dominion appoints, pays and removes judges.

County Courts: In each county there is a county court. The county judges are appointed by the Governor General-in-Council during good behaviour. The province controls the constitution, organisation and maintenance of the county courts while the Dominion possesses the power of appointing, paying and removing the judges. The county or district courts have intermediate jurisdiction and decide cases involving claims beyond the jurisdiction of small debts courts, although they do not have unlimited monetary jurisdiction; they also hear criminal cases except those of the most serious type. In addition to being trial courts, county and district courts have a limited jurisdiction to hear appeals from decisions of magistrates' courts. The province of Quebec does not have the system of county or district courts.

Minor Provincial Courts: Such courts are entirely under provincial control regarding organisation, maintenance and also appointment, pay and conditions of service. The term of the judicial officers of these courts is at pleasure. These courts take up cases pertaining to the estates of deceased persons and civil cases concerning minor personal actions, breaches of contract, debts, etc, involving small amounts.

The Magistrates' Courts are established under the Magistrates Act for the trial of designated minor criminal offences and a few civil cases under special statutes. In large towns and cities minor courts such as Juvenile Courts and Family Courts, Coroners' Courts and Courts of Arbitration also exist.

The Federal Courts

Section 101 of the British North America Act empowers the Parliament to provide from time to time for the Constitution and organisation of a General Court of Appeal for Canada and for the establishment of any additional courts for the better administration of Canadian laws. The Parliament has so far established a Supreme Court, Exchequer Court now called the Federal Court, and certain miscellaneous courts, such as the Tax Review Board, the Martial Appeal Court and the Immigration Appeal Board.

Supreme Court

The Supreme Court is at the apex of the Canadian system of courts. It was established in 1875 and was vested with appellate authority both in civil and criminal matters pertaining to the Dominion. To begin with, it consisted of a Chief Justice and five other judges. The number was raised to six in 1927 and now it consists of nine judges including Chief Justice of whom three at least must come from Quebec. Presently, the Court is governed by the Supreme Court Act of 1962. The judges are appointed by the Governor General on the advice of the national Cabinet. They hold office during good behaviour. They are made to retire at the age of seventy-five. They are removable by the Governor General-in-Council, following an address of the Parliament of Canada. The Court sits at Ottawa.

It's Jurisdiction

Appellate: The Supreme Court possesses mainly appellate jurisdiction. Firstly, it hears appeals from the provincial courts in civil cases when the value of the case in dispute exceeds $10,000. Secondly, if a question of law is involved, an appeal may lie to the Supreme Court. Thirdly, an appeal may also be brought from any other final judgement with leave of the highest provincial court. If the latter court does not grant such leave, the Supreme Court may grant it. Fourthly, in matters where an interpretation of the Constitution or the validity of the Dominion or provincial legislation is involved, an appeal may lie to the Supreme Court. Fifthly, in criminal matters, an appeal may be taken if the decision of the provincial court of appeal is not unanimous. Sixthly, the Supreme Court hears appeals in cases of controversial elections. Seventhly, appeals lie to the Supreme Court from the Canadian Exchequer court and the Board of Transport Commissioners.

Advisory: Unlike American and like the Indian Supreme Court, the Canadian Supreme Court possesses advisory jurisdiction. It has to render advice to the Governor General in respect of any question of law or fact on a reference being made to it. The opinion of the Supreme Court is not however, binding upon the Governor General nor is it binding upon the judges in any specific case.

It will not be out of place to point out that up to 1933 appeals in criminal cases could be taken to Judicial Committee of Privy Council though they were stopped in 1933. Likewise till 1949, appeals from civil cases could be carried from the decisions of the Supreme Court to the Judicial Committee of the Privy Council. With the passage of an Amendment Act in 1949, the Parliament of Canada was empowered to legislate regarding constitutional matters and through a statute it abolished all appeals to the Privy Council and made the Supreme Court a court of final appeal in all cases. Five judges normally sit together to hear a case, although on important matters it is customary for all judges of the Court to sit.

The Federal Court: In 1970, the Exchequer court of Canada, established in 1875, was replaced by the federal court. This court consists of two divisions, Trial and Appeal, with a total of twelve judges. They hold office during good behaviour and are removable by the Governor General on address of the Senate and House of Commons. There is now a retirement age at seventy for these judges.

The court possesses original jurisdiction along with provincial courts, in cases involving the revenues of the Crown. It has exclusive jurisdiction over suits brought against the Crown in federal affairs. It also deals with claims against the Crown for property taken or any public purpose or adversely affected by the construction of any public work, and claims against the Crown arising out of any death or injury to a person or his property due to the negligence of any officer or servant of the Crown while at work. It (trial division) also hears cases regarding patents, copyrights, customs and excise, income tax, trademarks and industrial designs. It exercises jurisdiction over certain category of railway suits also. It has two divisions, a Trial Division and an Appeal Division; the Appeal Division hears appeals from decisions rendered by the Trial Division and by many boards and agencies.

The federal court also acts as a Court of Admiralty. In this capacity, it possesses original as well as appellate jurisdiction.

An appeal lies to the Supreme Court from any judgement of the Federal Court of Appeal with the leave of the court when in the opinion of the Court of Appeal the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

It may be emphasised at the end that the judiciary in Canada is independent and impartial and is held in high esteem. The judges are not answerable to Parliament or to the executive branch of the Government for decisions rendered. No judge, whether federally or provincially appointed, may be subjected to legal proceedings for any acts done or words spoken in judicial capacity in a court of justice. The country is administered according to the rule of law and the litigants have faith in the impartiality, independence and integrity of the judges.

CHAPTER 30

THE CONSTITUTION OF AUSTRALIA

Historical Background

Australia has a parliamentary democracy on the British model, with all the traditional freedoms and responsibilities which that system imposes on its citizens. The formation of the governmental institutions known to a nation-state began when the continent was first occupied by Captain Arthur Phillip under commission from the British Government, who brought a party of 1,030 soldiers, sailors and convicts to eastern Australia on January 26,1788. From then until about 1815, the colony remained in substance an open-air prison, and the Government an autocracy of Governors who were naval or military officers. As the number of the free-settlers increased, a movement towards representative and responsible Government started. This movement had two components: getting rid of the rule from London, and extending the basis of political authority in Australia.

Geography

Australia is 2,500 miles from east to west and 2,000 from north to south, covering 29, 67,741 square miles. It is more than half as large as Europe (excluding the USSR) and almost the same size as the United States of America (excluding Alaska and Hawaii). It lies southeast of Asia, between the Indian Ocean and the Coral Sea and the Tasman Sea of the South Pacific Ocean. It is the smallest of all the continents and contains six states: New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. As Australia covers more than thirty parallels of latitude, there is a wide variation of climate. Its population is more than one and a half crores. Canberra is the national capital.

Transfer of Power

Before 1901, the present Australian states were self-governing British colonies. The Australian Colonies Government Act, 1850, was the key measure in the transfer of effective power to these colonies. The Act established Legislative Councils and gave them the power to establish local legislatures and to regulate the franchise and qualifications for membership of such legislatures. The Act also gave to these legislatures the general power to make laws for the 'peace, welfare and good Government' of the respective colonies, including power to amend their own constitutions. New South Wales, Victoria, South Australia and Tasmania accordingly drafted constitutions setting up bicameral legislatures. Queensland on its separation in 1859, acquired bicameral legislature by an order of the Council under the provisions of the New South Wales Constitution Act of 1855. Western Australia acquired self-government in 1890.

From 1855 onwards, the British Parliament passed many Acts which permitted Australian legislature to take action on matters previously thought incidental to 'imperial policy'. The most important of these was the Colonial Laws Validity Act of 1865, which provided that colonial laws were not to be regarded invalid because these were inconsistent with English Law including the un-enacted law or basic English statutes. Invalidity would arise only in the case of colonial legislations 'repugnant' to British statutes or enacted laws, which were applicable in the colony in question. Since only a few British statutes were applicable in the colonies and because the colonial legislatures possessed the general power to legislate for 'peace, welfare, and good Government' without any significant checks on that power either in the British legislation or in the colonial Constitutions, the colonial legislatures were 'sovereign legislatures' in the British sense of sovereignty.

With the influx of new population caused by the gold rush of the 1850s and subsequent economic expansion, pressure for widening the franchise and democratic reform started building up. The pressure was resisted by conservatives who wished to retain a special political role for 'property'. By 1900, all colonies had adopted secret ballot and suffrage at twenty-one. They acquired a vigorous political life expressed through institutions having an obvious resemblance to Parliamentary Government and Cabinet system as it had developed in England, though the achievement was at an uneven rate of political and constitutional development.

Towards a Federal Idea

During the period, when the six colonies were asserting their separate independence from Britain and from each other, some voices suggested that geography, common origins and culture, foreign and defence affairs, economic advantage and practical convenience created a need for some sort of concerted action among the colonies, and even a formal union. However, nothing tangible came out. The colonists were intent in the first place on building representative and responsible Governments in the several colonies, and were nearly as suspicious of possible central Australian authorities, as they were of control from London. The best known and most frequent advocate of some form of Australian union was Henry Parkes (1815-96) described as "a large-brained self-educated Titan". He was in the New South Wales Parliament from 1854 until his death in 1896, and had been Minister several times and Premier five times. Another advocate of federal union was Samuel Walker Griffith (1843-1920), who entered the Queensland Parliament in 1872, and held many ministerial posts. Both Parkes and Griffith spearheaded the federal movements—Parkes providing the rhetoric and Griffith the constitutional learning.

A convention of the six Australian Governments was held in Sydney in 1883, to discuss common action in the face of French and German colonisation and acquisitions in the South Seas. The convention agreed to create a 'Federal Australian Council' consisting of two representatives from each self-governing colony and one from each Crown colony. The Council was to have power to deal with naval defence on the high seas, relations with the Pacific Islands, the influx of criminals, and such other matters as the participating colonies referred to it. The Council was however, given neither independent financial resources nor any executive arm. The British Parliament enacted the Federal Council of Australian Act of 1855 providing the legal framework for the creation of the Federal Council. The Federal Council however, failed to achieve its purpose. New South Wales and New Zealand did not join it. South Australia joined it in 1889, and only for two years. Parkes, who had previously favoured a Federal Council, withdrew his approval on the ground that a stronger union was needed. However, the Council enabled many colonial leaders to meet for mutual discussion which demonstrated the need for a much stronger and irrevocable type of union if Australia was to become a nation.

Parkes, by now the Grand Old Man of Australian politics, appealed to the Australian Governments to meet in a conference to consider the need for a true Federation. His initiative led to the meeting in Melbourne in February 1890, of representatives from the six Australian and the New Zealand Governments. It was a distinguished gathering. After emphasising the need for the union of the colonies, under one legislative and executive Government on principles just to the colonies, the meeting requested the members to procure nomination by their legislatures of representatives to attend a convention to consider and report upon an adequate scheme for a federal Constitution.

A Convention was held in Sydney on March 2, 1891, under the Presidentship of Parkes. It was the first National Australian Government consisting of seven representatives from each colony and three from New Zealand. The Convention called for a new federal authority with a bicameral Parliament, a responsible executive drawn from the party in majority in the Lower House, advisory Governor General as titular head, and a federal court to hear all Australian appeals. The federal authorities were to be given well-defined specific powers with undefined residue to the states. A Draft Constitution bill was adopted by the convention on April 9 . R. R. Garran wrote, "Federation came down from the clouds to the earth, it changed from a dream to a tangible reality."

The Federal idea however, languished on account of the economic depression and bank failures of 1890-95 which claimed attention of the politicians. The labour leaders also were suspicious of the Federal scheme because they considered Federalism as a middle-class enthusiasm to secure capitalist aims. The cause of Federation however, did not die altogether. It was kept alive by widespread popular movements, partly educational and partly propaganda. The Federation Leagues, led by Barton and the Australian Natives Association acting under its influential leader John Quick, kept the Federal cause alive. A Conference of the Federation Leagues was held at Corowa on July 31,1893. The Conference resolved that a Convention should be held to which the delegates should be elected through popular election. Accordingly, the second National Australian Convention began on March 22, 1897, in Adelaide. The Convention had Kingston as President and Barton as leader. Barton moved a series of general resolutions closely resembling the Parkes resolutions of 1891. On its conclusion (March 31), Committees were appointed to handle the Constitution, Finance and the Judiciary. The whole membership of the Convention was distributed among these Committees. The Constitution Committee was the most important which appointed Barton, O' Connor and Downer on the Drafting Committee. The Committee presented its report on April 8, and on April 12, Barton presented the draft to the Convention. The Convention adjourned on April 22, to enable the Parliaments of the five participating states to consider the Constitution Bill. On September 2, 1899 the Convention resumed its sitting to consider the state suggestions. They adjourned again on September 24, and resumed its sittings in Melbourne on January 20, 1898 for the final session ending on March 17 . A Federation Bill was then adopted and sent off as agreed for popular referendum.

This Bill was approved at referenda held in Victoria, South Australia and Tasmania; in New South Wales the Bill failed at the referendum. A Premiers Conference was held in Melbourne from January 29, to February 2, 1899, to discuss the resulting stalemate. Some of the demands of the Opposition in New

South Wales were met and the draft bill was amended accordingly and fresh referenda held in New South Wales, Victoria, South Australia and Tasmania, in April-July 1899, all obtaining overwhelming majority in favour. Queensland held a referendum in September, 1899 which produced a narrow but sufficient majority in favour. Western Australia still demanded concessions. At this point, the British Government indicated its willingness to negotiate the enactment of the Federation Bill even without the consent of Western Australia.

Making of the Federation

The delegates arrived in London in March, 1900 and produced the draft of the Constitution. Joseph Chamberlain, the Colonial Secretary, placed before the British Parliament the Commonwealth of Australia Constitution Act on March 14, 1900 which was finally passed on July 5 , 1900, and received the Queen's assent on July 9 . Meanwhile Western Australia's Parliament also passed its enabling act, and on July 31, its voters passed the referendum. On September 17, the Queen proclaimed that on January 1, 1901, the Australia Commonwealth would come into existence, with all the six Australian colonies as original states of the Federation. The present Constitution of Australia is the Commonwealth of Australia Act 1900, as amended from time to time.

THE MAIN FEATURE

The present Constitution of Australia is to be found in the Commonwealth of Australia Act, 1900, which came into force on January 1, 1901. It is a statute of the British Parliament containing nine clauses. The first eight clauses are commonly called the 'covering clauses'; they contain introductory, explanatory and consequential provisions. The ninth clause contains, 'The Constitutions'. The Constitution is divided into eight Chapters and contains 128 Sections. Its main features are as follows:

Preamble

The opening words of the Australian Constitution proclaim: "Whereas the People of the New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite into one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established ..." This means that although the Australian Constitution was enacted by the British Parliament, it however, is the product of the efforts of the Australian people. The word 'Commonwealth' shows its democratic nature in a better way. The 'Federation is indissoluble' implies, no state has the right to secession. Speaking on the Commonwealth of Australia Bill, 1900, in the House of Commons, Joseph Chamberlain, Colonial Secretary, observed: "The Bill has been prepared without reference to us, it represents substantially in most of its features the general opinion of the best judges in their own case, and we are quite content that the views of their representatives should be in these matters final." Quick and Ganan say: "The opening words of the Preamble proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people, it is clothed with the form of law by an Act of the Imperial Parliament of the Government of Britain and Ireland." Lord Bryce observes: "If any country and its Government were to be selected as showing the course which a self-governing people pursue free from all external influences and little trammelled by intellectual influences descending from the past, Australia would be that country. It is the newest of all the democracies."

A Union between Independent States

Before the Federation came into being in 1901, the present Australian states were self-governing British colonies. At the conventions, an overwhelming majority of the delegates were in favour of the rights of the states. There was a strong emphasis on preserving the structure and powers of the states, so far as consistent with the union for specific and limited purposes. The federal scheme proposed in the Commonwealth Act does not go very far in the centralising direction. Section 106 of the Act continues the constitution of the states, and Section 107 emphasises this by continuing the powers of the state Parliaments. The states have the power to amend their own constitutions. They derive their constitutions and powers from British statutes, just as much as the Australian Government derives its structure and powers from the British statute embodying the constitution. The Governors of the states are appointed by the Crown without any reference to the Federal Government and the latter has no power to interfere with the laws passed by the state legislatures.

A Federal Constitution

The Constitution declares Australia a federation. All the requisites of a federation— written and rigid Constitution, division of powers and judicial review—are found in the Constitution. The powers of the Federal Government have been specified, the residuary being left to the states. The Federation is indissoluble. No state has a right to secede. In 1934, Western Australia submitted a petition to the British Parliament for secession from the Commonwealth of Australia and "A select Committee of the Lords and Commons decided that

Parliament was by constitutional convention not competent to deal with such a matter merely upon the petition of a single state of Australia." This decision emphasises the fact that in practice as well as in law, no right of secession vests with any state acting alone. The Australian federation is akin more to American federation than to Canadian.

Parliamentary Government

The Constitution of Australia provides for a Parliamentary Government at the centre. The powers of the Governor General are exercised by him only on the advice of Federal Ministers or the Executive Council. He is appointed by the Crown on the advice of the Ministers of the Commonwealth and is an Australian citizen. He is liable to be recalled on the same advice. He is merely a constitutional head. The real power vests in the Federal Executive Council headed by the Prime Minister who is the leader of the party in majority in the Lower House. The ministers are jointly responsible to the House of Representatives and they remain in office so long as they enjoy the confidence of that House. The members are free to ask questions to the Ministers. The House of Representatives and the Senate are elected directly by the people. Each adult citizen, who is eighteen years of age or above, has the right to vote. In the states also parliamentary system exists. The head of the Council of Ministers in the states is called the Premier.

Civil Liberties

Although the Australian Constitution does not contain any separate chapter on the fundamental rights of the people, the persons living in Australia are guaranteed their basic rights and liberties. So far as the Constitution is concerned, it has only three provisions directly relevant to this topic: the guarantee of religious tolerance in Section 116, the requirement of non-discrimination in Section 117, and the requirement of just terms on acquisition of property in Section 51. The other fundamental guarantees—liberty and security of persons, freedom of association, freedom of expression, freedom of movement, liberty to petition, fair trial, freedom from arbitrary arrest, are not included in the Constitution. But it does not imply that the Australian people do not possess these rights. It is a general assumption of the Australian system that no interference by one person in another person's affairs is lawful unless there is a specific rule of law which authorises the interference in question. There is no presumption that Governments or officials have powers merely because they exist. An attempt to interfere in civil liberty will have to be justified by reference to a statute or regulation, etc, made under a statute. As in Britain, people's liberties in Australia are protected more by tradition than by constitutional guarantees.

In this respect, the Australian Constitution differs from the American and Indian Constitutions which enumerate the basic rights of their citizens. It is said that liberty is better protected under systems of Australian types than in the countries which have powerful constitutional guarantees of individual rights. Three main arguments are advanced to support this view, first, when a liberty has a constitutional guarantee, it is easily destroyed in toto by suspending the guarantee (in India it has often happened); whereas in the absence of a guarantee, it would be necessary to repeal all the detailed laws relating to the question— a much more difficult and complicated operation; second, that in the absence of a constitutional guarantee, the political grouping of the country will be more on the alert to resist infringements through demonstrations, etc; third, that effective Government is not possible without some limitations on liberty and if these limitations are stated in rigid legal form, the result is either too much or too little liberty at a particular time. It may be remarked that a completely comprehensive set of fundamental guarantees indubitably valid and binding on both Australian and state parliaments, as to the future can be created only by an amendment of the Constitution under section 128.

Rigid Constitution

The Australian Constitution is a rigid one. Section 128 provides that only law proposing an amendment passed by an absolute majority in both the Houses of Parliament must be submitted to the electors of the House of Representatives in each state and territory to vote upon it by means of referendum within not less than two nor more than one month after its passage through both the Houses. If any such law is passed by one House and rejected by the other, and is passed again by the same House after a lapse of three months or in the next session, the Governor General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both the Houses, to the electors in each state for referendum. If in a majority of the states the majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor General for the Queen's assent. However, if the amendment proposes an alteration of the limits of any state or a diminishing of its proportion of members in each House or a change of any sort in its separate rights under the Constitution, it shall not become law unless the majority of electors voting in that state approve it. Thus, an amending bill must first be passed in the Federal Parliament, and then at the referendum by a "double majority" of the electors as a whole, and by the electors in a majority (four) of the states. In some circumstances, an amendment may require majority approval in every state. Very few constitutional proposals have been referred to the people in referendum and the substance of the Constitution remains much as it was in 1901. The amendments are rejected because they fail to receive the requisite state majority. In its report submitted in 1958, the Joint Committee on Constitutional Review suggested that in future if the overall majority in referendum was in favour of the proposal submitted, then only in three out of the six states and not a majority of the states, should a majority be required. The suggestion was repeated by the Committee in 1959. However, no action was taken on these reports. Even if the majority in three states instead of the four is provided, the Constitution of Australia would still remain very rigid.

Equal Representation in the Senate

Like the American Constitution, the Australian Constitution also provides for equal representation of the states in the Upper House. Originally, every state had six senators. However, by the Representation Act of 1948, the membership was increased from thirty-six to sixty, and each state was given the right to send ten representatives. The senators are elected by the people directly. In the composition of the Senate, the Australian Constitution follows the American pattern.

Independent Judiciary

In the organisation of judiciary, the Australian Constitution follows the American model. The High Court of Australia has been given the power of judicial review. It can declare any law unconstitutional. It is the final court of appeal in all Federal cases. It can also hear appeals from the Supreme Courts of the States. The judges cannot be removed except by the Governor-General-in-Council, on an address from both the Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

Separation of Powers

The Australian Constitution follows the basic tripartite 'separation of powers' made familiar by the British and Colonial practice. The Constitution vests Federal Parliament in which legislative power is vested (Section 1), a body of Ministers acting in the name of the Queen and Governor General, in whom the executive power is vested (Section 61), and Federal Judiciary, exercising the power of judicial review. In virtually all matters, the Governor General acts as advised by his Ministers, but there can be rare cases in which he has to exercise personal discretion.

States' Constitutions

Like the American Constitution but unlike the Indian, the Australian Constitution does not include the structure of the state Governments. It only makes some general provisions in regard to the states. Section 106 says: "The Constitution of each state of the Commonwealth shall, subject to this Constitution, continue as at the admission or establishment of the state, as the case may be, until altered in accordance with the Constitution of the State." The state Constitutions take their origin in British statutes, and differ materially in constitutional type from the Federal Constitution. In order to get a complete picture of the six state Constitutions, one has to go back over a series of British statutes. The states have from time to time in order to consolidate the whole of their statute law, produced a single 'Constitution Act.' Thus, the South Australia Constitution Act, was reprinted as amended in 1961, Tasmanian Constitution Act in 1959, New South Wales in 1957, Victoria's in 1958, Queensland's in 1962, Western Australia's in 1967—these state Constitutions vary greatly in length and in the statutes they include. If the Tasmanian Constitution Act has 46 Sections, the Victorian Constitution has 478 Sections. The state Constitutions are simpler and more flexible than the Federal Constitution.

Inter-State Commission

The Australian Constitution provides for an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance within the Commonwealth, of the provisions of the Constitution relating to trade and commerce and of all laws made there under. The members of the Inter-State Commission are appointed by the Governor General-in -Council for a period of seven years removable on an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity.

Therefore, the Australian Constitution like the Indian Constitution is a mixed form of the British and the American Constitutions. It is a parliamentary democracy with federal scheme but unlike the Indian Constitution, the states in Australia have their own Constitutions with the power to amend them. It is more federal than the Indian Constitution.

CHAPTER 31

THE CONSTITUTION OF THE RUSSIAN FEDERATION

Historical Background

The whole of Russian history is a story of accidents." Though in the present volume we are concerned with the Constitution of Russian Federation, yet a brief survey of events preceding it, will interest the reader.

Revolution of 1905

"The cold murder of 500 workers and infliction of injuries to over 3,000 of them who were peacefully demonstrating against the tyrant Czar for getting their grievances redressed on Sunday, January 9, 1905 under the leadership of Father Gepon, a clergyman, enkindled the fire which ultimately brought down the citadel of Imperialist rule in 1917. Father Gepon while fleeing for his life, when police started firing at peaceful crowd, left a message for the Czar which read as follows: "the innocent blood of workers, their wives and children lays for ever between thee, oh soul destroyer of the Russian people." The spilling of blood was to be avenged sooner or later. The magic of monarchy was gone for ever. Czar's attempts to pour oil over the troubled waters by announcing the constitution of a parliamentary body known as "Duma", consisting of two Chambers in April 1906 could hardly succeed in hoodwinking the Russian masses. In the words of Dr Finer, the Duma "was a shackled mongrel with little power."

The Fate of Duma

The 'Duma' was to be a tool in the hands of the Czar. It could make laws only on the initiation of the Czar who was vested with the veto power as well. In case, the Duma did not pass the budget, the last budget was to prevail. The Duma could not make laws regarding loans. Ministers were to be responsible to the Czar and not to the Duma. The Czar could dissolve Duma at his discretion. How could a body of this type evoke a favourable response from the masses who no longer wanted to be governed by an autocratic ruler? Hence, the first Duma lasted from April to July 1906; the second Duma could function from February to June, 1907; the third could enjoy a full term, i.e., from November, 1907 to June, 1912 and fourth could last from November, 1912 to February, 1917. With the advent of war, powers, if any, had been virtually withdrawn.

The Great War and Its Influence on Russia

Though the foundations of the Czar's autocratic regime had been shaken, yet he frantically clung to the substance as well as further exposed the infirmities of autocratic rule. The Russians were badly organised and ill-equipped. Gross incompetence in administrative direction and military supply was quite discernible from the military disasters. Mobilisation was being speeded up, though means for equipping and provisioning these "peasants in uniform" did not exist. Food was scarce. The blockade of the Baltic Sea further worsened the situation, as food could not be imported from the friendly countries of the world. On the one hand, the spectre of starvation haunted the soil, on the other hand, the profiteers and black-marketeers believed in making hay while the sun shone. Prices of commodities soared. Inefficiency and corruption became the order of the day. The stupid policy of prohibition deprived the state exchequer of more than a quarter of total revenue. Thus, the country under these stirring circumstances was heading towards a cataclysm which was apt to topple down the corrupt administration. Nicholas II—the Czar lacked practical sagacity and political acumen needed to face the baffling situation. His advisers, chief of whom were, his unbalanced neurotic wife the Tzarina and Rasputin—an uneducated and licentious peasant, the so-called "man of God" and Boris Sturmer - the most incapable Prime Minister, always misguided him and made him dance to their tune. Under the influence of the Empress and Rasputin the Czar, committed the greatest blunder of his life by agreeing to resume the command of the army. The departure of the King to the war theatres ushered in an era of 'personal autocratic rule' of the Empress and Rasputin. The wise counsellors were removed. Many competent heads of departments who differed from the unwise policies of the Empress, and "Man of God" were dismissed. By 1916, Rasputin was the virtual head of the State. Warnings to the Czar for impending catastrophe by the loyalists went unheeded. Instead, the Czar fumbled and fumed. On December 30,1916, Rasputin was assassinated by Prince Yusupov and his supporters. Thus, the stage was set for the enactment of drama-the February Revolution.

The February Revolution

In this state of sagging of morale and break down organisation, riots broke out on February 23, 1917. The troops sent to suppress them also joined hands with insurrectionists. About 70 to 80 thousand workers and half famished people of Petrograd marched through the streets of Petrograd—the capital, demanding food. The troops of the Petrograd garrisons instead of quelling the agitation actively helped them in aggravating the adverse situation. The Government failed to resist the upsurge of Revolution. The Duma elected from its own members a Provisional Committee and established a Provisional Government. The Czar was forced to abdicate at the Duma's demand and fled with his family. Later on, he was slaughtered by Bolsheviks.

It may be made clear that the breakdown of the Czarist authority in February-March 1917 was not brought about by the Bolsheviks. Lenin was in Switzerland and Trotsky was in New York. The collapse of the Czar's Government cannot be attributed to the concerted action of any group or party. In the words of Sir John Maynard" "*The people of Russia by a common but unconcerted impulse, stood out from this State, of which they no longer had need; and almost in a moment, it was not.*" In fact, the whole affair was so sudden, so spontaneous and so few were prepared to fight for the Czar that only 100 persons were killed in the uprising. Dr Finer has very well portrayed the character of this Revolution in the following words: "*This was a Russia's real revolution for the authority of 1000 years was gone. It was not Lenin's revolution; it was not the Communist Revolution; it was not the Revolution of the Bolsheviks or even the Mensheviks. It was a left wing bloc, loose but ardent that sent Czarism to perdition.*"

The Provisional Government

In Petrograd, a national Provisional Government was set up by Duma, with Prince Lvov as its head. The rest of the members of his cabinet were mainly drawn from Octobrists (Conservatives) liberal and even monarchist members of Duma. Only the Socialist Revolutionary-Alexander Kerenski was included in it. The Government aimed at establishing parliamentary system of Government within the framework of capitalist society but the people were not prepared to accept it. The economic deterioration of the country necessitated a complete revolutionisation of the existing structure of society. The Radical groups dubbed the Provisional Government as a 'Middle Class Rule'. The Petrograd Soviet of Soldiers and Workmen's Representatives which came into existence in February, 1917 stood against Provisional Government since its inception. Soviets manned by the Social Revolutionaries and Social Democrats which were established in other parts of the country and in the army aimed at not only demoralising the army but also paralysing the Provisional Government. In fact, their activities paved the way for "October Revolution."

In the meantime, Lenin arrived, with German connivance in a sealed train. "Now entered the sharpest revolutionary and most fanatical wills of all to agitate and seize the minds of the population." Trotsky arrived in May, after being released from internment, on the initiative of Russian Government. Other Bolshevik leaders - Kamenev Radek, Launacharski also came. Soon after their arrival, the Bolshevik leaders started agitating against the Provisional Government. Lenin issued his famous document - April thesis, which demanded immediate peace. He coined the slogan, "All Power to the Soviet." On May 3 and 4, demonstrations were staged against certain members of the Provisional Government under the guidance of Lenin and his colleagues. An attempted revolution took place in June, under Bolshevik leadership though it was suppressed. Kerensky-the then Premier failed to take drastic steps against the Bolsheviks and the reactionary elements who were forging a united front under General Kornilov.

The October Revolution

The Bolsheviks started inciting the soldiers and peasants for an immediate cessation of hostilities and seizure of land. The masses stood by them. In the meantime the Bolsheviks had thrown themselves into army and labour politics. The second All-Russian Congress of Soviets which met on November 7, let Bolshevik troops quietly and simultaneously capture all public buildings and important military stations.

The members of the Provisional Government were arrested. Kerensky managed to escape. It took only one day to round up the ministers and various other officials and occupy the Government offices. There was almost no bloodshed. It was an easy 'walk over.' A new Government was set up. All its members except four who belonged to 'Left Social Revolutionaries' were Bolsheviks. The new Government was named as 'Council of People's Commissars' and was headed by Lenin. At the same time, the Congress of Soviet declared Russia as the Russian Socialist Federated Soviet Republic. Immediately after capturing power, the Bolsheviks renamed themselves as 'Communists' and shifted the capital from Petrograd to Moscow. This completed the second stage of the Revolution. It is obvious from the account of the above two Revolutions that if the March Revolution set up a bourgeois Government, the November Revolution established a Socialist Government. It may interest the reader that the

November Revolution is known as "February Revolution" as well, according to Julian calender.

Post-Revolution Developments

Immediately after the November Revolution, the Second "All Russian Congress of Soviets" convened a Constituent Assembly. Elections to this Assembly were held in November, 1917. Bolsheviks could capture only 25 per cent of seats in the said Assembly. Socialist Revolutionaries won the majority. The Assembly held its session on January 5, 1918 and refused to recognise the revolutionary decrees of the Congress of the Soviets. The Bolsheviks had hoped that the Assembly would approve Lenin's plans but the Assembly went to the extent of challenging the legality of Soviet regime. When it met next morning, January 6, Red soldiers "hustled the members out and told them not to return." The Assembly was, thus, dissolved. A Committee was appointed by the Central Executive Committee of the Communist Party to draft a Constitution for Russia. The Constitution was drafted and approved by the All Russian Congress of Soviets on July 10, 1918.

1918 Constitution

The 1918 Constitution established the Russian Socialist Federated Soviet Republic which comprised three quarters of the Czarist Empire. It embodied the series of rules and decrees and declarations which were made between November Revolution and July, 1918. It established a Federation, though of a unique type. The framers of the Constitution aimed at toppling down the capitalistic superstructure of society and establishing a World Federation composed of diverse nationalities and scattered territories at no distant future. All this was compatible with Marxian ideology and Lenin's dream to have a Communistic Democracy. In fact, Lenin was keen to reconcile two incompatibles-the dictatorship of the Bolshevik leaders and genuine mass democracy. But he soon realised that he was crying for the moon. Hence, for the time being, he opted for the former, though he suggested a scheme of Government which should permit mass participation to a certain extent.

1924 Constitution

The 1918 Constitution was amended in 1923. The country was renamed as USSR (Union of Soviet Socialist Republics). It was now to be comprised of four Constituent Republics-the RSR, the Ukraine, White Russia and Transcaucasia. The Uzbek and Turkman Constituent Republics were added in 1924.

After the Civil War was won, the Constitution of 1918 was to be made adaptable to the entire USSR. Hence, it became the model for the one adopted in 1923. Though the new Constitution was put into effect in 1923, yet it was formally ratified by the Supreme Soviet of the USSR in January, 1924. Hence, it is often termed as 1924 Constitution.

Though the new Constitution was considered a mere replica of the old one, yet it created three new bodies - All Union Congress of Soviet, All Union Central Committee and all Union Presidium. All Union Congress of Soviet was declared to be the supreme political authority of USSR. It was, in fact, a Parliament of the country consisting of two Houses-the Soviet of Union and the Soviet of Nationalities. Voting was public and by a show of hands.

Right to vote was granted to all except persons tainted by bourgeois origin or association with the Czarist regime, monks, priests, imbeciles, employers of labour and those who were engaged in trade or lived on their incomes.

System of indirect election to all bodies except village or factory Soviets was introduced. Distinction between rural and urban voters was another distinctive feature of 1924 Constitution. It provided one representative for every 25,000 factory workers and one representative for every 1, 25,000 village peasants. Discrimination between rural and urban voters was made on the ground that a greater representation to the more advanced and indoctrinated industrial worker was essential in the initial stages.

Since Federation was established by the Constitution, powers were divided between the Federal Government and the units mostly on the American pattern. It may however, be pointed out that the powers given to the Centre were so wide that the entire economic system of USSR was to be manned by the Centre.

Moreover, the Union Government was empowered to veto any law or decree of a constituent Republic, if it was repugnant to the Constitution. The Union Congress was vested with the power of laying down general principles to be followed by the constituent Republics in the matter of civil and criminal law, judicial procedure, labour legislation and schools.

The Stalin Constitution (1936)

The Constitution of 1924 lasted for twelve years. Between the years 1923 and 1935 several attempts were made to make the Constitution more democratic in character. The Constitution of 1918 and 1924 did not embody socialist system which was the cornerstone of Karl Marxian ideology. Two Five Year Plans had affected a tremendous change in the economic set-up of the country. By 1932, rapid industrialisation had taken place in USSR. The process of collectivisation also had achieved tangible results. Private trade was substituted by co-operative trade. The basic political aim of the Second Five Year Plan was "the final liquidation of the capitalist elements and of classes in general, the complete elimination of causes that lead to class distinctions and exploitation and overcoming of the survival of capitalism in the economic organisation and in the mind of men and the transformation of the entire population into conscious builders of the classless society." In fact, the class structure of the society consisted of only two classes-workers and peasants. Hence, the old Constitution did not suit Russian society which had undergone cataclysmic changes. Hence, the Seventh All Union Congress of Soviets appointed a Constituent Committee of 31 members on February 7, 1935, with Stalin as Chairman to draft a new Constitution. The Commission produced the Draft Constitution after a year's hard work. The Draft approved by the Presidium of Central Executive Committee was published in June 1935, to elicit public opinion. The Draft Constitution was discussed in 5, 27,000 public meetings. Thirty-six and a half million people participated in these meetings. 1,54,000 amendments were suggested. An extraordinary session of All Union Congress of Soviets was convened which unanimously approved the Draft Constitution with only 43 minor amendments, on December 5,1936. Stalin while addressing the Congress of Soviets hailed the new Constitution as "recording the establishment of Socialism, the disappearance of class-war and the triumph of Federal equality among the nationalities."

The Stalin Constitution came into force in 1936.

The Brezhnev Constitution (1977)

Under the Stalin Constitution, the USSR made rapid progress in every field and soon became a world power. Explaining the basic reasons for drawing up the new Constitution of USSR, L I Brezhnev, General Secretary of the Communist Party said, ***"The 1936 Constitution was adopted when we had in fact, just completed the creation of the foundations of Socialism ... what we now have in the Soviet Union, is an advanced, full-fledged Socialist State. Major changes of fundamental importance have occurred in every aspect of public life ... As a result, the world balance of forces has been entirely altered. There have, in brief been the major changes in our society and in our country's life since 1936."*** Accordingly, the Soviet leaders decided to give a new constitution to the country. A Committee of 96 members under the Chairmanship of L I Brezhnev was appointed which placed the new draft of the Constitution before the Central Committee of the Communist Party of the Soviet Union in its session on May 24, 1977. The Central Committee accepted the draft and recommended its circulation for national debate. The draft was widely discussed by every section of Russian society in groups and meetings. The various organisations expressed their views through press also. About 4 lakhs proposals for amending the draft were received by the constitutional Commission. On the basis of these proposals the Commission amended 110 Articles of the draft and added one new Article also. A special session of the Supreme Soviet of the USSR was convened on October 7, 1977 to adopt the new Constitution which came into force from the same day. The Brezhnev Constitution of USSR had 174 Articles and was the fourth Constitution since the October Revolution, 1917.

1988 Constitutional Changes and After

Drastic changes were effected in the Constitution in 1988 under the leadership of Gorbachev. The Congress of Peoples Deputies as directly elected body was established and was turned as super Parliament. The composition, position and functions of the Supreme Soviet and Presidium underwent drastic changes. A Constitutional Inspection Committee was also established to safeguard the Constitution. The democratic trend was in its full swing.

The hardliners amongst the Communists could not stand the restructuring of economy and the dawn of era of openness. Hence, there was an attempt of ***coup*** against Gorbachev on August 19, 1991. A state of emergency was declared sending shock waves across the world which had witnessed unprecedented reforms during Gorbachev's six years rule. His ouster as the Soviet President for 'health reasons' appeared 26 years after his pro-reform forerunner Khrushchev was replaced as party leader by fellow party comrades. The reinstatement of Gorbachev was demanded by massive rallies and strikers across the Soviet. Union. Even the troops were all out for storming the Russian Republic Parliament building. The hardliners faced international opposition which is evident from the suspension of food credit guarantees and technical assistance worth 570 million pounds to the Soviet Union. All this resulted in the reinstatement of Gorbachev and triumph of the spirit of democracy and freedom. However, the credit for organising resistance movement went to Yeltsin-(Russian Federation President). After his' return to Kremlin, Gorbachev resigned from the party leadership, disbanded the Central Committee, confiscated the party property banned party cells from Army, KGB and Interior Ministry on August 24, 1991. The conspirators were arrested including Valentin Pavlov—the Prime Minister and Alexander Bessmertnykh— the Foreign Minister. The heads of

KGB, Interior and Defence ministries were removed. According to the critics, the coup attempt exploded the myth that the Soviet Union was unsuited to democracy.

Power Structure before Collapse of Soviet Union

On September 2, 1991 the Soviet Parliament approved in principle a new power structure to prevent disintegration of the country as a consequence of abortive coup. Gorbachev and leaders of ten Republics presented a seven-point plan to the Congress of People's Deputies on September 2, 1991. It envisaged setting up of an Inter-Republican Council as repository of all powers and growing independence to Republics to determine the form of their links with a new Union of sovereign States. The plan exhorted all the 15 Republics, including those keen for full-fledged autonomy, to immediately conclude an economic and collective security agreement, to preserve a united armed force and military strategic space. The new power structure was to be composed of an Inter-Republican Council of 20 representatives each, nominated by the Republican legislatures to decide Council issues; a State Council of the Soviet President and leaders of the Republics to coordinate domestic and foreign policy; and Inter-Republican Committee of all the 15 Republics to coordinate economic reforms.

The changes proposed stunned the Deputies. Obviously their approval by the Congress meant the inception of new power structure in which the Republics would have a decisive say and also end of the Congress itself three years before the expiry of its tenure. The sweeping changes were the outcome of the urgency of the situation created by the abortive coup attempt and to "prevent further disintegration of power structure until a new political system" was conceived. However, three Baltic Republics-Latvia, Lithuania, Estonia and Georgia refused to sign the agreement. Thus, a break-up of the Soviet Union, sooner than many had expected, after the turmoil of Perestroika and Glasnost seemed to be a writing on the wall. In fact, the 70 hour drama in Moscow between August 19 and 22 brought revolutionary changes in the bloodless Russian Revolution. One Republic after another declared their independence. The three Baltic States, Russia, Armenia, Georgia and Byelorussia were the first to declare independence. Gorbachev and his new team seemed to have accepted disintegration of Soviet Union when they were left with no alternative.

Historic Decision of September 5, 1991

In a historic decision on September 5,1991 the Congress of People's Deputies (Soviet full Parliament) voted for the following constitutional amendments:

(a) Dismantling of the highly centralised Soviet Union and converting it into a loose Confederation.

(b Abolition of the office of the Vice President.

(c) Disbanding of the CPD and the Supreme Soviet.

(d) Transferring of all powers to Republics dominated structures till the signing of new treaty of Union of Sovereign States held together largely by economic and military alliance.

(e) Restructured Supreme Soviet to amend the Constitution during transitional period.

(f) The Lower House of the Council of Union to be formed from among the Congress Deputies by the Republics themselves according to their present quota. The rest of the Deputies were to retain their status till fresh elections.

(g) The State Council of the Republican Heads chaired by Gorbachev was to coordinate the internal and foreign politics of the country.

(h) An interrepublican economic Committee to perform the duties of an interim Government.

(i) In case of Presidents' ailment, the State Council to elect the caretaker President from its members.

(j) All Federal bodies responsible for the country's defence security, law and order and international affairs to be directed by the President and the State Council.

(k) The USSR Constitution to be applicable to the Republics to the extent it does not contravene their Constitutions.

(1) The old Marxist-Leninist economic policy to be replaced by western style market economy.

(m)Republics to be recognised as subjects of international law and their membership in the United Nations to be considered.

(n Independent Republics refusing to enter the new union to negotiate with USSR to sort out issues relating to secession, their joining of Nuclear Non Proliferation Treaty and other international treaties and agreements.

(o) To scrupulously honour during the transition period all international agreements and obligations assumed by USSR.

Commonwealth of Independent States (December 21, 1991)

On December 21,1991 leaders of eleven of the 12 Soviet Republics met at Alma Ata (Kaszakh Capital) and made history by signing agreements to proclaim a new Commonwealth of Independent States. It clearly signified a formal end to the Soviet Union. Leaders of all the Republics except Georgia agreed on three key documents that had to serve as the basis for the new Euro-Asian Commonwealth. Russia took the place of USSR in the UN Security Council. The leaders of eleven Republics proclaimed that there was no role for Gorbachev in the Commonwealth and took away the only power and job he still had (chief of armed forces) by having Defence Minister as Commander-in-Chief of the armed forces pending a final decision on the structure of the army. It was however, assumed that Gorbachev would not be considered as criminal and he would be entitled to financial and other facilities needed for his well-being. He was expected to resign with dignity.

Blow to Gorbachev and Resignation

The signing of the agreements dealt a severe blow to the frantic efforts of reformist Gorbachev to keep the Republics under a new Union Treaty. It was a triumph for Boris Yeltsin-the architect of the new Commonwealth and once an architect of Gorbachev and his saviour from coup attempt.

Gorbachev who changed the face of the Soviet Union and the world resigned as President of the USSR on December 25, 1991 (late night). It brought to a close the Soviet chapter of history. In 12 minutes live television address he said "Even now I am convinced that the democratic reform programme we initiated in 1985, was correct ... Due to the situation that has evolved I hereby discontinue my activities as the President of the USSR ... The worst thing about this crisis is the collapse of Statehood. I am concerned that the citizens of this country are ceasing to live in a great power." Gorbachev who had worked hard to save the Soviet Union with a new treaty after a craze of demands for independence since the mid 1990s nursed a hope— "our joint efforts will yield fruit and our people will live in a flourishing and democratic society ... I will use my influence and possibilities to ensure that the Commonwealth of Independent States lives and works."

It fell upon his successor Yeltsin, an uphill task to plant a new order upon the wreckage of the old Soviet Union. Yeltsin, the undisputed leader of Russian Republic and first among equals of the New Commonwealth of independent states faced a series of grave challenges that threatened to dash his hopes to the ground before they even get off the ground. Rutskoi remarked, "*Under Yeltsin leadership there is neither Government nor democracy in Russia. If anarchy develops, the consequences could be unpredictable.*"

Thus, Commonwealth of Independent States could not be of lasting nature. Their mutual bickering and conflicts surfaced right from its inception. Former Soviet President Gorbachev compared the situation in CIS to that of 'camp of gypsies' and made a political prediction that "If economic and social problems were to worsen dictatorial regimes could be set up in different republics. In a way he prophesied possible disintegration of the CIS unless they agree to strengthen their ties by the creation of joint bodies such as 'Common Political Council', Security Council and Military Command." His prophesy came out to be true. The CIS got extinct like house of cards. The Constitution of Russian Federation as approved by Boris Yeltsin and later by a nationwide Referendum came into force on December 12, 1993.

The Latest Events

The former Russian President Vladimir Putin took over as the Prime Minister of the country on May 8, 2008 though he was chosen on May 7, 2008. On his new assignment he promised the nation that he would make Russia the world's sixth largest economy based on purchasing power in 2008.

Putin's era December 28, 2006

The era buoyed by its oil and natural gas riches became so confident and so arrogant that it became almost impervious to the criticism that might have modified its behaviour. The critics from investors to foreign governments have acquiesced to the new reality. On December 27, 2006 the executives of three major international companies agreed to cede control of the world's largest combined oil and natural gas project. This was portrayed as a 'historic occasion' as six months regulatory assault on the project - **Sakhalin** II ended and the companies surrendered control of it to the state energy giant - **Gazprom.**

It enabled Kremlin to dictate its terms with greater assertiveness than it has done at any time since the disintegration of Soviet Union. Even Bush's administration gave its approval for Russia's cherishingly sought for membership of the World Trade Organisation. In the words of Fyodor A Luciana (Editor of Russia in Global Affairs), "Russia last year has been enjoying some feeling of euphoria, that feeling that we have so much money , so many resources that we can do what we can." Really state control of a lucrative project-Sakhalin II opens the gas market to Asia.

With all this Putin who had completed his tenure as President was retained as Prime Minister of the country in May, 2007.

August 14, 2008 Deal with Georgia

Russia is gradually gaining strength and trying its best to revive its past glory.

Russia signed a peace Deal with Georgia on August 16, 2008 to end five days war. President Medvedav signed the French led peace plan already signed by Georgia's' President -Mikhail Sakashvilli. According to the Plan, both Russian and Georgian forces were withdrawn to their pre-war positions. Thus, ended the hostilities and the renunciation of use of force. The agreement authorised Russian forces to adopt extra security measures on a temporary basis till International Peace keeping forces of UN Security Council arrived. Even President Bush praised this step on the part of Russian President. He described it as a 'hopeful step' but exhorted Moscow to pull out its forces.

Introduction

Russian Federation, located in Central Asia has an area of 6,592, 849 square miles. It is quite thickly populated. Its population as on April, 2001 was 146,001,176. Its ethnicity reflects a mixed population comprising 81.5 per cent Russians, 3.8 per cent Tartars, 3 per cent Ukrainians, 1.2 per cent Chuvashs, 0.9 per cent Bashkirs, 0.8 per cent Byelorussians and 0.7 per cent Moldavians. Anybody eighteen years of age or more is entitled to Russian citizenship. Russian is the predominant language. Russians inhabiting the Russian Federation celebrate Independence Day on June 12, 1990 though it attained independence from Soviet Union on August 24, 1991. The Constitution of Russian Federation came into force on December 12, 1993. Moscow remains its capital.

Government in Brief

(1) Executive: The Russian Government is headed by the President who is all powerful, though hedged with certain restrictions. Vladimir Putin who was elected by popular vote on December 31, 1999 was its first President. He was assisted by the Premier—the Chairman of the Government (presently Mikhail Mikhaylovich Kasyanov) five Deputy Premiers and twenty-nine ministers. The Chairman is appointed by the President subject to confirmation by the State Duma.

(2) The Federal Assembly which was to be its legislature consists of State Duma, the Lower House, which is composed of four hundred and fifty members elected for a period of four years. Presently G N Seleznev is the Chairman of

the House. The Federation Council consisting of one hundred and seventy-eight Deputies was the Upper House. Yegor S Stroyev was its chairman.

(3) Judiciary: It comprises of constitutional courts consisting of nineteen judges nominated by the President and confirmed by the Federation Council. Besides, there is a Supreme Court and a Superior Court of Arbitration nominated by the President and confirmed by the Federation Council.

(4) Local Government comprises forty-nine oblasts, twenty-one autonomous republics, ten autonomous okrugs, six krays, two Federal cities and one autonomous oblast.

Political Parties

Prior to the disintegration of USSR, there existed only one party—Communist Party which alone ran the show. State Duma Election held on December 7, 2003, revealed the existence of twenty-three political parties besides Independents. However, only three parties garnered more than 5% of the votes. United Russia Party (Pro-Putin) won 36.84 per cent of votes leaving the Communist Party far behind as it got 12.7 percent of the votes only.

Preamble of the Constitution

Like that of the USA or Indian Constitution, it starts with a Preamble, which is not a part of the text of the Constitution. The Preamble runs as follows:

"*We the multinational people of the Russian Federation united by a common destiny on our land, asserting human rights and liberties, civil peace and accord, preserving the historic unity of the State, proceeding from the commonly recognised principle of equality and self-determination of the peoples, honouring the memory of our ancestors who have passed on to us love of and respect for our homeland and faith in good and justice reviving the sovereign statehood of Russia and asserting its immutable democratic foundations striving to secure the well- being and prosperity of Russia and proceeding from a sense of responsibility for our homeland before the present and future generation, and being aware of ourselves as part of the world community, hereby approve the Constitution of the Russian Federation.*"

SALIENT FEATURES OF THE CONSTUTION

Some of the salient features of the Constitution of Russian Federation (equivalent to Russia) are as follows:

Written

Like that of erstwhile Soviet Union, USA, India, France, Canada, Switzerland, etc., the Constitution of Russia's Federation is a written one comprising of 137 Articles. The Constitution was approved by President Yeltsin and adopted by referendum on December 12, 1993. Minor textual changes to Article 65 were added by order of the President on January 9, 1996. Evidently, it is a brief document.

A Sovereign Democratic Federal Republic.

Articles 3 and 5 declare Russia as "a Democratic Federal Republic. They have made a provision for democratic election on adult suffrage basis. Anybody who is twenty-one years of age has right to elect his representative. Referendum and free elections are the direct manifestation of the power of the people."

Its federal character is evident from its constituent units-republics, territories, regions, federal cities, autonomous region, and autonomous areas which compose it. Further, its federal structure is founded on the State integrity, the uniform system of State power, determination of scope of authority and powers between the bodies of State power and Russian Federation and the bodies of State power of the subjects of the Russian Federation. All the subjects of the Russian Federation enjoy equality among themselves in relation with the federal bodies of State power.

The ***sovereign*** character of the Federation is evident from the supremacy of the Constitution of Russian Federation and Federal laws throughout the entire territory of the Russian Federation. The Russian Federation is to ensure the integrity and inviolability of its territory.

The Federation is headed by a President who is an elected functionary and can be removed through a cumbersome procedure of Impeachment. He cannot contest for a third time (as is the case with the American President).

Incorporation of Rights and Duties (Articles 57-59)

(a) ***Rights:*** The earlier Constitution of erstwhile Soviet Union also contained the impressive Chapter of Rights though civic rights existed only on paper. Economic rights were no doubt impressive. The Constitution of Russian Federation assures full democratic rights to the citizens. Article 2 of the Constitution states, "Humans, their rights and freedom; are the supreme value." It is the duty of the State to recognise, respect and protect the rights and liberties of humans and citizens. The basic rights and liberties which are supposed to conform to the commonly recognised principles and norms of the international law are recognised and guaranteed in the Russian Federation and under the Constitution. Articles 17 to 56 deal with Rights—right to life; right to liberty; equality before law; right to privacy; inviolability of home; right to religion; right to speech and expression; right to form association, and take to demonstrations; right to elect and be elected; right to equal access to State service; right to private property; right to work and statutory minimum wages; right to family; right to a house; right to health care and medical assistance; right to education; freedom of literary, artistic, scientific, intellectual and creative activity; guaranteed protection of law for safeguarding liberties; the right to qualified legal Council; right to compensation by the State for damage caused by unlawful action of the State, etc. These are prominent rights. The list of Rights is indeed impressive. Its safeguards also have been assured. Civil, economic and political liberties have been guaranteed.

(b) ***Provision of Duties:*** Articles 57 to 59 refer to duties, viz. payment of lawful taxes and fees; preservation of nature and the environment; defence of homeland; and rendering of military service. These duties make the citizen's law abiding and patriotic.

Presidential Form of Government

Russian Federation has opted for Presidential form of Government because the Constitution makes the President omnipotent. His powers are numerous and authority onerous. Only on grounds of health or in the event of impeachment, on account of treason or other grave crime, he is removable from the office. The procedure of his removal is very cumbersome. He appoints the Chairman of State Duma. He presides over the meetings of the Government of the Russian Federation and plays an assertive role.

Bicameral Legislature

The Federal Assembly which may be termed as Parliament of the Russian Federation consists of two chambers—the Federal Council (Upper House) and the State Duma (Lower House). The State Duma is to consist of four hundred and fifty Deputies who are to be elected on the basis of universal adult franchise. The Federal Council is to consist of two Deputies from each subject of the Federation— one from the representatives and one from the executives bodies of a State authority. The State Duma is elected for a period of four years. The procedure for forming the Federal Council and the procedure for electing the Deputies to the Duma was to be established by Federal law as per constitution. The State Duma is comparatively more powerful than the Federal Council so far as control over legislation is concerned. President's rejection of the Federal bill passed by the Federal Assembly can be overruled, if both the Houses of the Assembly, by a majority of not less than two-thirds of the total members of the Deputies, pass the bill for a second time. The President in such cases will have no other option but to pass the bill within seven days. However, this may be an uphill task and it may virtually prove to be veto of the President.

Russian Government

The Russian Cabinet and its Chairman are not the creatures of the Russian President alone. The Chairman of the Government of the Russian Federation is to be appointed by the President with the consent of the State Duma. After the State Duma rejects candidates for the office of the Chairman of the Government nominated by the President three times, the President can nominate the Chairman of the Government, dissolve the State Duma and call fresh elections. Thus, checks and counterchecks have been provided though eventual ascendancy of the President in the formation of Government is clearly discernible. The State Duma also may express no confidence in the Government of the Russian Federation. The Government can by itself hand over its resignation to the President which may or may not be accepted. However, if the State Duma again persists for no-confidence within three months, the President shall announce the resignation of the Government or dissolve the State Duma. Obviously, mutual checks and balances have been conceived to restrain arbitrariness.

Significant Role of Judiciary

There is a provision of Supreme Court, the apex of judicial system in civil, criminal, administrative and other matters triable by general jurisdiction courts. Besides, there is a provision for the Supreme Arbitration Court— the highest judicial body for resolving economic disputes and other cases considered by arbitration courts. Apart from the Supreme Court and Supreme Arbitration Court, a Constitutional Court comprising nineteen judges has also been provided. It resolves cases (a) about compliance with the Constitution of the Russian Federal, (b) of Federal laws, (c) normative acts of the President of the Federation; the Federation Council; State Duma; and the Government of Russian Federation; Republican Constitution, charters, laws and other normative Acts. The Constitution Court is the interpreter of the Constitution, though it will take up such cases on the advice of the President of the Federal Council, State Duma, the Government of the Russian Federation and the legislative bodies of subjects of the Russian Federation.

Rigidity of the Constitution

The Constitution is rigid in character. The proposals for amendments are to be made by the President of Russian Federation, the Federal Council, the State

Duma, the Government of Russian Federation as well as one-fifth of the Deputies of the Federal Council or the State Duma. The revision of the provisions of chapters 1, 2 and 9 of the Constitution are to be supported by three-fifth of the total number of Deputies of the Federal Council and the State Duma. Thereafter, a special Constitutional Assembly will be convened in accordance with the federal constitution law. Two-third members of the Constitutional Assembly or popular voting can approve it. Amendments to chapters 3-8 of the Constitution can be adopted in accordance with the procedures envisaged for the adoption of Federal constitutional law.

Amendments in Article 65 of the Constitution which determines the position of the Russian Federation shall be made on the basis of the Federal Constitutional law.

The above provisions clearly reflect that amendment procedure is fairly cumbersome and complicated.

Supremacy of Constitution

In the erstwhile Soviet Union, the Communist Party enjoyed supreme position. Constitution was handmaid of the party and it could be manipulated the way the Politburo of the Communist Party or its General Secretary so wanted. However, constitution of 1993 has been accorded supreme legal position. It is applicable throughout the entire territory of Russian Federation. The laws and other legal acts adopted by the Russian Federation may not contravene the Constitution. The organs of State power, local self-Government officials, citizens and their associations are required to comply with the Constitution. The provisions of the Constitution constitute the foundations of the constitutional system of the Russian Federation and cannot be changed except as provided in the Constitution. It has been clearly laid down that no other provision of this Constitution may contravene the foundation of constitutional system of the Russian Federation. Like that of American Constitution, the Constitution of Russian Federation enjoys supremacy.

Sovereignty of People

Article 3 emphasises sovereignty of people. The multinational people of the Russian Federation constitute the vehicle of sovereignty and the only source of power in the Russian Federation. The Russian people exercise their power directly and also through organs of State power and local Self-Government. The provision of referendum and free election reflect the supreme direct manifestation of the power of the people. The sovereignty of the Russian

Federation as derived from people applies to its entire territory. The Russian Federation ensures the integrity and inviolability of its territory.

Provision of State Principles

(1) The Russian Federation is a social State whose policies aim at creating conditions which ensure a dignified life and free development of man.

(2) The Russian Federation protects the work and health of its people; establishes a guaranteed minimum wage, provides State support for family, motherhood, fatherhood and childhood; and for the disabled and elderly citizens, develops a system of social services; and establishes Government pensions, benefits and other social security guarantees.

Conclusion

The Constitution of the Russian Federation is a democratic Constitution. One party dominance has since been replaced. Rights incorporated are not mere musty parchments. They exist in theory as well as in practice. The President of the Republic has been made all powerful; still his wings have been clipped to some extent. He is subjected to impeachment and there are curbs on his powers of appointing Chairman of the Government. The Duma can checkmate his powers by disapproving his choice of Chairman by three ballots and put its disapproval stamp.

Presently, the Communist Party is a force to reckon with in the Duma as it is dominated by the Opposition, led by Communists. It cannot claim a monolithic and omnipotent character, as was the case previously. There are other political parties which too have a potent voice in the matters of the State. Chernomyrdin, who remained Chairman of the Government (Prime Minister) for five years, belonged to NDR group—the single largest Parliamentary party. After Kiriyenko's dismissal as Prime Minister after five months of tenure in toto, Yeltsin had again appointed Chernomyrdin for the post in order to tide over the economic crisis. All this reflects that one-party dominance led by a communist General Secretary is a thing of the past. Smooth takeover of Presidential reins by forty-seven-year-old Putin on March 17, 2000 clearly indicates the dawn of a democratic era in Russia. Putin captured fifty-two per cent of the votes in a Presidential election, defeating communist leader Gennady Zyuganov. It was said to be the most solid victory of a Russian leader after Yeltsin who won fifty-six per cent votes in 1991.

Since Putin completed his tenure of Presidency, Dmitry Medvedev was sworn as Russian President in Moscow on May 7, 2008. However, Vladimir Putin - former President was appointed as the Prime Minister on May 8, 2008.

Constitutional Amendments

Articles 134 to 137 deal with constitutional amendments and revisions of the Constitution. As already said, the Constitution of the Russian Federation is rigid.

How are proposals made?

The proposals of amendments and revision of constitutional provisions may be made by the President of the Russian Federation, the Federal Council, the State Duma, and the Government of the Russian Federation, the legislative bodies of the subjects of Russian Federation and one-fifth or more of Deputies of the Federal Council or State Duma.

Exceptions

(i) The provisions of Chapters 1, 2 and 9 of the Russian Federation may not be revised by the Federal Assembly. In the event, a proposal to revise any provisions in chapters 1, 2 and 9 is supported by three-fifth of the total number of Deputies of the Federal Council and State Duma, a Constitutional Assembly is to be convened in accordance with the Federal Constitutional law.

The Constitutional Assembly may either confirm the inviolability of the Constitution of the Russian Federation or frame a new draft of the Constitution of the Russian Federation which is to be adopted by two-thirds of the total number of Deputies to the Constitutional Assembly or submitted to popular voting. The Constitution shall be considered adopted during such poll if more than half of its participants have voted for it, provided more than half of the electorates have taken part in the poll.

(ii) Amendments to Chapters 3-8 of the Constitution shall be adopted in accordance with the procedures envisaged for the adoption of a Federal Constitutional Law and shall come into force, following the approval by no less than two-thirds of the subjects of the Russian Federation.

(iii) Changes to Article 65 which determines the composition of Russian Federation can be made on the basis of Federal Constitutional Law, on admission to Russian Federation and formation with a Russian Federation of a new subject, and on a change of the constitutional legal status of the subject of the Russian Federation.

In the event of a change in the name of a republic, territory, region, federal cities, autonomous area, the new name of the subject of the Russian Federation shall be included in Article 65 of the Constitution of Russian Federation.

Appraisal of amending procedure

An analytical appraisal of the amendment procedure reveals that it is a rigid Constitution, which cannot be easily amended. Some of the provisions pertaining to Chapters 1, 2 and 9 require support of three-fifth of the Deputies of the Federal Council and State Duma which is not that easy to obtain particularly when the multiple party system exists in the Federation. Likewise, amendment to Chapters 3-8 requires approval by two-third of the subjects of the Russian Federation. This also is fairly cumbersome.

The rest of the amendments can be affected by the President, the Houses of the Federal Assembly, the Government of Russia, the legislative bodies of the subjects of Russian Federation and group of Deputies, at least one-fifth of the total number of Deputies of the Federal Council or State Duma. These may be treated as flexible part of the Constitution. For bringing the country out of State of inaction and acute financial crisis, a blend of flexibility and rigidity was deemed imperative.

RIGHT AND DUTIES

Article 2 of the Constitution clearly lays down that man; his rights and freedom are of supreme value. Hence, it is the duty of the State to recognise, respect and protect the rights and liberties of men and citizens. The erstwhile Soviet Union also boasted of a chapter of rights as incorporated in the Stalin Constitution. On that basis, they claimed that "Russian Democracy is a thorough-going democratism." However, the critics like Dr Finer remarked, "Russian leaders wrested authority from Czars and usurped it and gave to the people a few crumbs baked on guns and revolvers." A critical appraisal of the rights and the safeguards for their protection in the New Constitution of Russia reflects that, like other democracies of the world, Russian Federation's Constitution also has assured social, economic and political rights to the peoples both in letter and spirit. We state below a synopsis of the rights as enshrined in the New

Constitution. The rights have been elaborated in the article which too have been stated.

A. Civil Rights

Right to equality (Article 19)

(1) All people are equal before law and in the court of law.

(2) The State guarantees the equality of rights and liberties without discrimination on the basis of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, conviction, membership of public association or any other circumstances. No restrictions are laid down on the rights of citizens on social, racial, national, linguistic or religious grounds.

(3) There is equality of rights and liberties between men and women. They are provided equal opportunities for their pursuit.

Right to Life (Article 20)

Everyone has right to life. Hence, a person charged of grave crime against life has been allowed right to be heard in a court of law by jury. Capital punishment, until its abolition, may be instituted by the Federal law as an exceptional punishment.

Human Dignity (Article 21)

(1) The dignity of the person is protected by the State. No circumstance may be used as a pretext for belittling it.

(2) No one is to be subjected to torture, violence or any other harsh or humiliating treatment or punishment.

(3) No one is to be subjected to medical, scientific or other experiments without his or her consent.

In erstwhile Soviet Union, human dignity was always at stake if a person did not owe allegiance to the Communist Party or at least to the communistic thought. In that era, another party could exist on the condition that one party is in power and the other is in the jail. Stories of torture of even literateurs who wrote facts about tortuous conditions, meted out to the non communists, were rife and were oft repeated. Hence, in this Constitution emphasis has been laid on human dignity and avoidance of harsh and humiliating treatment.

Personal Freedom (Article 22)

(1) Everyone has the right to freedom and personal inviolability.

(2) Arrest, detention or keeping in custody are permitted by an order of a court of law only.

(3) No person can be detained for more than forty-eight hours without an order of a court of law. This is just like right to liberty in the Indian Constitution.

Right to Privacy (Article 23)

(1) Everyone is entitled to right to privacy, to personal and family secrets and to protection of one's honour and good name.

(2) Everyone has the right to privacy of correspondence, telephone communications, mail, cables and other communications. Such a right can be restricted only by an order of a court of law.

Access to Material affecting Liberties (Article 24)

(1) Nobody is allowed to gather or disseminate information on the private life of any person without his or her consent.

(2) Access to documents and material affecting his/her rights and liberties will be allowed as stipulated under the law.

Privacy of House (Article 25)

The house is inviolable. None can enter the house against the will of persons residing in it, except under an order of a court of law or if stipulated by federal law.

Right of Choice of Native language and National Identity

(1) Everyone possesses the right to use his native language and choose freely the language of communication, education, training and creative work.

(2) Everyone has the right to determine and state his natural identity. No one can be forced to determine and state his natural identity.

Freedom of Movement and Residence (Article 27)

(1) Everyone staying in Russian Federation has the right to freedom of movement and chooses the place to reside.

(2) Everyone is free to leave the boundaries of Russian Federation. The citizens of the Russian Federation possess the right to freely return into the Russian Federation.

Right to Religion (Article 28)

(1) Everyone is guaranteed the right to freedom of conscience, of religious worship; to profess individually or jointly with others any religion or to profess no religion.

(2) To freely choose, possess and disseminate religious or other beliefs and to act in conformity with them. In erstwhile Soviet Union, religion was considered "opium of the masses". "If men are to live God must quit," was the maxim of the diehard communists. In the present era, religion is no longer a taboo or a thing to be shunned.

Freedom of Thought and Expression (Article 29)

(1) Everyone possesses the right to freedom of thought and speech.

(2) Propaganda or campaigning, inciting social, racial, natural or religious hatred and strife is not permissible. The propaganda of social, racial, natural, religious and language superiority is forbidden.

(3) No one can be compelled to express one's views and convictions.

(4) Everyone possesses the right to seek and disseminate information by any lawful means.

(5) Freedom of mass media is guaranteed.

(6) Censorship is prohibited.

Right to Association, Demonstrations (Articles 30, 31)

(1) Everyone has the right to association. As such, right to form trade unions in order to protect one's interest has been guaranteed.

(2) No one can be compelled to join any association or seek its membership.

(3) The citizens of Russian Federation can gather for peaceful demonstration, marches and pickets.

B. Political Rights

(1) The citizens of Russian Federation shall have the right to elect and be elected.

(2) They have a right to participate in Referendum. However, those found by court of law to be under special disability shall not have right to elect or be elected.

(3) Citizens shall have equal access to State service and participate in administration.

C. Economic Rights (Articles 34 to 37)

Economic rights provided in the Constitution are fairly impressive.

(1) Everyone possesses the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law.

(2) No economic activity aimed at monopolisation or unfair competition is allowed.

(3) Right to property is to be protected by law. Everyone will possess the right to have property in his or her ownership. Nobody is to be arbitrarily deprived of his or her property. Preliminary and equal compensation is payable to him/her if needs necessitate such deprivation.

(4) The right of inheritance has been guaranteed.

(5 Citizens and their associations possess the right to have land in their private ownership. However, this is not to infringe upon the rights and interests of other persons.

(6) Work shall be free. Everyone can make free use of any occupation. However, forced labour is prohibited.

(7) Everyone is entitled to right to work and statutory minimum wage and security of employment.

(8) Everyone has right to rest and leisure.

D. Social Rights (Articles 38-44)

Social rights reflect the intense care being conceived for the child, mother and the aged in Russian Federation.

(1) Motherhood, childhood and family have been kept under State protection.

(2) However, the Constitution does not absolve the parents from the care for children and their upbringing.

(3) Employable children who attain the age of eighteen years are required to care for their non-employable parents.

Article 39

(1) Everybody shall be guaranteed social security in old age

(2) State pension and social benefits will be established by law.

(3) Voluntary social insurance.

(4) Development of additional forms of social security.

Article 40

(1) Everyone shall have the right to have a home.

(2) Low income citizens and other citizens in need of housing shall be housed free of charge or for affordable pay from Government, municipal and other housing trusts, conforming to the norms stipulated by law.

Article 41

(1) It assures right to health care and medical assistance.

(2) The Russian Federation is to finance Federal *health care* and *health building Programmes.*

(3) It will take measures to develop State, municipal and private health care systems.

(4) It will encourage activities contributing to the strengthening of man's health, development of physical culture and sport and to ecological, sanitary and epidemiological welfare.

Article 42

It guarantees everybody the right to a favourable environment and reliable information regarding health or ecological violations.

Article 43

(1) It guarantees ***right to education.***

(2) Basic general education has been made mandatory. However, parents or persons substituting for them are required to make provisions for their children to receive basic general education.

(3) Russian Federation will institute Federal State educational standard and support various forms of education and self-education.

Article 44

(1) Everybody is to be guaranteed freedom of literary, artistic, scientific, intellectual and other types of creative activity.

(2) Everybody is allowed to participate in cultural life and make use of cultural institutions and have an access to cultural values.

(3) Everyone is to care for the preservation of the historic and cultural heritage.

Article 48

Everybody is guaranteed qualified legal counsel.

Article 49

(1) Everybody charged with crime shall be deemed not guilty till verdict of a court goes against him.

(2) The benefit of doubt will go to the defendant.

Article 50

(1) No one can be repeatedly convicted for the same offence.

(2) Anybody sentenced for a crime can get the sentence reviewed by a higher court according to the procedure instituted by the Federal law.

Article 51

Nobody is obliged to give evidence against him or herself.

Article 53

Everyone has the right to compensation by the State for the damage caused by unlawful actions of State organs or their officials.

Article 54

No one will be held liable for an action which was not recognised as an offence at the time of its commitment.

Restrictions

Rights have been hedged with certain restrictions. For instance, to ensure the safety of citizens and protection of constitutional system, individual restrictions of rights and liabilities to certain extent and certain duration may be envisaged. However, the rights and liabilities as stipulated by Articles 20, 21, 23, 24, 28, 34 shall not be subjected to restrictions.

Duties (Articles 57 to 62)

Besides an impressive list of civil, economic, political and social rights, certain Articles lay down a number of duties as well.

Article 57

According to this Article, everyone is required to pay lawful taxes and fees.

Article 58

It states that everybody is obliged to preserve nature and the environment.

Article 59

Defence of the Homeland is a duty of primary importance. The citizens are required to do military service when asked for.

Article 62

The possession of the citizenship of a foreign State by the citizen of the Russian Federation will not deprive them of liabilities or exempt them from duties.

Evaluation

Rights and duties, as incorporated in the Constitution of Russian Federation, are in line with other democratic countries opting for civic freedom, political rights, economic privileges and specific rights aiming at social uplift. Thus, the old chapter of negation of civic freedoms and political rights stand closed. Russian Federation now makes a sincere attempt to assure freedoms to Russians in consonance with international norms and democratic practices.

Besides rights, significant duties also have been included in continuation with the past practice in Soviet Union. Hence, it was rightly hoped that Russian

Federation under the dynamic President Putin will enable countrymen to usher in an era of peace and prosperity and enable them to lead lives of human beings and not be treated as dumb driven cattle. The hoary past which denied them basic rights assured in other liberated democracies of the world now stands extinct. Keeping in view the hollowness and so called thoroughgoing democracy in erstwhile Soviet Union Dr Munro remarks, "If this be democracy, then democracy is the most shameless thing on the earth".

CHAPTER 32

HISTORICAL BACKGROUND OF THE INDIAN CONSTITUTION AND ITS DISTINCT FEATURES

Drawn from different sources

The Constitution of India is remarkable for many outstanding features which will distinguish it from other Constitutions even though it has been prepared after "ransacking all the known Constitutions of the world" and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed.

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when die first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing . . . Given these facts, ail Constitutions in their main provisions must look similar. The only new things, if there be any, in a Constitution framed so late in the day are the variations made *to remove the faults and to accommodate it to the needs of the country.*"'

So, though our Constitution may be said to be a 'borrowed' Constitution, the credit of its framers lies in gathering the best features of each of the existing Constitutions and in modifying them with a view to avoiding the faults that have been disclosed in their working and to adapting them to the existing conditions and needs of this country. So, if it is a 'patchwork', it is a 'beautiful patchwork'.

There were members in the Constituent Assembly who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for about sixty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

Supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78.

It must, however, be pointed out at the outset that many of the original features of the 1949-Constitution have been substantially modified by the 78 Amendments which have been made up to 1996, -of which the 42nd Amendment Act, 1976 (as modified by the 43rd and 44th Amendment Acts, 1977-78), has practically recast the Constitution in vital respects.

The 73rd Amendment Act which was brought into force in April 1993 has added 16 articles which provide for establishment of and elections, to Panchayats. They comprise a new part, Part IX. By the same Amendment a new schedule (Sch. 11) has been added which enumerates the functions to be delegated to the Panchayats.

The 74th Amendment Act was passed to establish Municipalities and provides for elections to them. It has inserted Part 9A consisting of 13 articles. Schedule 12 inserted by the Amendment mentions the functions to be assigned to the Municipalities. This Amendment came into force on 1st June 1993.

The longest known constitution

The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still (in 2008) contains 444 Articles and 12 Schedules.

During the period 1950-2000, while a number of Articles have been omitted,—64 Articles and 4 Schedules have been *added* to the Constitution, *viz.,* Arts. 21 A, 31A-31C, 35A, 39A, 43A, 48A, 51 A, 131 A, 134A, 139A, 144A, 224A, 233A, 239A, 239AA, 239AB, 239B, 243, 243A to 243ZG, 244A, 257A, 258A, 290A, 300A, 312A, 323A, 323B, 338A, 350A, 350B, 361 A, 363A, 371A-371-I, 372A, 378A, 394A.

This extraordinary bulk of the Constitution is due to several reasons :

Incorporates the accumulated experience of different Constitutions

(i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes that might be anticipated in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights upon the model of the American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On die other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Detailed administrative provisions included.

(ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), the authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the form of administration was also included in it. In the words of Dr. Ambedkar,

". . . It is perfectly possible to pervert the Constitution without changing the form of administration."

Any such surreptitious subversion of the Constitution was sought to be prevented by putting detailed provisions in the Constitution itself, so that they might not be encroached upon without amending the Constitution.

The very adoption of the bulk of the provisions from the Government of India Act, 1935, contributed to the volume of the new Constitution inasmuch as the Act of 1935 itself was a lengthy and detailed organic law. So much was borrowed from that Act because the people were familiar with the existing system.

It was also felt that the smooth working of an infant democracy might be jeopardised unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Peculiarity of the Problems to be solved.

(iii) The vastness of the country (see Table I), and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire Part [*Part XVI*] relating to the Scheduled castes and Tribes and other backward classes; one Part *[Part* XVIII] relating to Official Language and another *[Part* XVII] relating to Emergency Provisions.

Constitution of the Units also included.

(iv) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units *(i.e.,* the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units had to be made, such as the Part B States (representing the *former Indian States),* the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the 1949-Constitution (see Table III).

Special provisions for Jammu & Kashmir

Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution. Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—for which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc.

Even after the inauguration of the Constitution, special provisions have been inserted *[e.g., Arts.* 371- 3711], to meet the regional problems and demands in certain States, such as Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizorma, etc.

Federal Relations elaborately dealt with.

(v) Not only are the provisions relating to the Units elaborately given, the problem between the Federation and the Units and the Units *inter se,* whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities", and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles and Fundamental Duties.

(vi) There is not only a Bill of Rights containing justiciable fundamental rights of the individual *[Part* III] on the model of the Amendments to the *American* Constitution but also a Part *[Part IV]* containing Directive Principles, which confer no justiciable right upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country',—being in the nature of 'principles of social policy' as contained in the Constitution of *Eire (i.e.,* the Republic of Ireland). It was considered by the makers of *our* Constitution that though they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of the organic law.

Even the Bill of Rights *(ie.,* the list of Fundamental Rights) became bulkier than elsewhere because the framers of the Constitution had to include novel matters owing to the peculiar problems of *our* country, *e.g.,* untouchability, preventive detention.

To the foregoing list, a notable addition has been made by the 42nd Amendment inserting one new Chapter of Fundamental Duties of Citizens *Wart* IVA, *Art.* 51 A], which though not attended with any legal sanction, nave now to be read along with the Fundamental Rights [see, further, under Chap. 8, *post].*

More Flexible than Rigid

Another distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal Constitution.

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification by 3/4 of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, *ie.,* a majority of not less than 2/3 of the members of each House present and voting, which, again, must be majority of the total membership of the House [see Chap. 10].

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes ''*shall not be deemed to be ''amendments' of the Constitution*". Instances to the point are—(a) Changes in the names, boundaries, areas of, and amalgamation and separation of States *[Art.* 4]. (b) Abolition or creation of the Second Chamber of a State Legislature *[Art.* 169]. (c) Administration of Scheduled Areas and Scheduled Tribes *[Para 7* of the 5th Schedule and *Para* 21 of the 6th Schedule]; (d) Creation of Legislatures and Council of Ministers for certain Union Territories *[Art.* 239A(2)].

Legislation as supplementing the Constitution.

Yet another evidence of this flexibility is the power given by the Constitution itself to Parliament to supplement the provisions of the Constitution by legislation. Though the makers of the Constitution aimed at exhaustiveness, they realised that it was not possible to anticipate all exigencies and to lay down detailed provisions in the Constitution to meet all situations and for all times.

(a) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (i) as to citoenship, Arts. 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Art. 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citizenship Act, 1955, so that in order to have a full view of the law of citizenship in India, study of the Constitution has to be supplemented by that of the Citizenship Act. (ii) Similarly, while laying down certain fundamental safeguards against preventive detention, Art. 22(7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The laws made under this power, have, therefore, to be read along with the provisions of Art. 22. (iii) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Protection of Civil Rights Act, 1955 which must be referred to as supplementing the constitutional prohibition against untouchability. (iv) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71(3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

The obvious advantage of this scheme is that the law made by Parliament may be modified according to the exigencies for the time being, without having to resort to a constitutional amendment.

(b) There are, again, a number of articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on tire subject, *e.g.,* exemption of Union property from State taxation *[Art.* 285]; suability of the State *[Art.* 300(1)].

The Constitution, thus, ensures adaptability by prescribing a variety of modes in which its original text may be changed or supplemented, a fact which has evoked approbation from Prof. Wheare—

"This variety in the amending process is wise but is *rarely found.*"

This wisdom has been manifested in the ease with which Sikkim, a Protectorate since British days, could be brought under the Constitution—first, as an 'associate State' (35th Amendment Act), and then as a full-fledged State of the Union (36th Amendment Act, 1975).

Reconciliation of a written Constitution with Parliamentary sovereignty.

This combination of the theory of fundamental law which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of *England* is the result of the liberal philosophy of the framers of the Indian Constitution which has been so nicely expressed by Pandit Nehru:

"While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. . . In any event, we could not make this Constitution as rigid that it cannot be *adapted* to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."'

The flexibility of *our* Constitution is illustrated by the fact that during the first 59 years of its working, it has been amended 94 times. Vital changes have thus been effected by the First, Fourth, Twenty-fourth, Twenty-fifth, Thirty-ninth, Forty-second, Forty-fourth, Seventy-third and Seventy-fourth Amendments to the Constitution, including amendments to the fundamental rights, powers of the Supreme Court and the High Courts.

Dr. Jennings characterised *our* Constitution as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during six decades has *not* justified the apprehension that die process of amendment is very difficult [see also Chap. 10, *post]*. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

"An example taken at random is article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two thirds of the members of each House sitting and voting in the Union Parliament?"

As Table IV will, show it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High Court shall not be entitled to compensation *[Art.* 222] and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

The greatest evidence of flexibility, however, has been offered by the amendments since 1976. The 42nd Amendment Act, 1976, after the Constitution had worked for over quarter of a century, introduced vital changes and upset the balance between the different organs of the State. Of course, behind this flexibility lies the assumption that the Party in power wields more than a two-thirds majority in both Houses of Parliament. '

Role of Conventions under the Constitution

It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room has been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution embodied the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'. Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings is, therefore, justified in observing that—

"The machinery of government is essentially British and the whole collection of British constitutional conventions has apparendy been incorporated as conventions."

Fundamental Rights, & Constitutional Remedies

While the Directive Principles are not enforceable in the Courts, the Fundamental Rights, included in Part III, are so enforceable at the instance of any person whose fundamental right has been infringed by any action of the State—executive or legislative-and the remedies for enforcing these rights, namely, the writs of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'. According to Sir Ivor Jennings, this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politicians'. It is they who thought of codifving the individual rights and the prerogative writs though none in *England* would ever cherish such an idea. In the words of Sir Ivor—

"Though no English lawyer would have thought of putting the prerogative writs into a Constitution, the Constituent Assembly did so. . .These various factors have given India a most complicated Constitution. Those of us who claim to be constitutional lawyers can look with equanimity on this exaltation of our profession. But constitutions are intended to enable the process of Government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us."

Judicial review makes the Constitution legalilstic

With due respect to the great constitutional expert, these observations disclose a failure to appreciate the very foundation of the Indian Constitution. Sir Ivor omits to point out that the fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

In *England,* the birth of modern democracy was due to a protest against the absolutism of an autocratic executive and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives. Though, of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modem problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.

The Founding Fathers of the *American* Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole source of that law, Americans had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolutism and autocracy which are ingrained in human nature itself.

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty' in India had known to what use the flowers of the English democratic system, *viz.,* the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an Imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that

"Our first care could be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances.*"

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.

At the same time, it must be pointed out that since die inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, *e.g.,* by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 3IB.

An independent Judiciary, having, the power of Judicial review', is another prominent feature of *our* Constitution.

On the other hand, we have avoided die other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates.

Judicial power of the State exercisable by the Courts tinder the Constitution as sentinels of. Rule of Law is a basic feature of the Constitution.

Compromise between Judicial Review and Parliamentary Supremacy.

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of *our* Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the *United States* has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of die Constitution to such an extent as to deserve the epithet of the 'safety valve' or die 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the power to invalidate a law duly passed by the Legislature- not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the *wisdom* of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

Under the *English* Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" *(Blackstone)* and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

"The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected only by itself."

So, English Judges have denied themselves any power "to sit as a court of appeal against Parliament".

The *Indian* Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, *e.g.,* Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature. But the Supreme Court has discovered 'due process' in Art. 21 in *Maneka Gandki.* Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

"No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way. . . Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as *social reform.*"

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, *e.g.,* Arts. 3ID, 32A, 131 A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored the pre-1976 position, to a substantial extent, through the 43rd and 44di Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—3ID, 32A, 131 A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of *our* Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court (see at the end of this Chapter).

Fundamental rights subject to reasonable regulation by Legislature.

The balancing between supremacy of the Constitution and sovereignty of the Legislature is illustrated by the novel declaration of Fundamental Rights which our Constitution embodies.

The idea of incorporating in the Constitution a 'Bill of Rights' has been taken from the Constitution of the United States. But the guarantee of individual rights in *our* Constitution has been very carefully balanced with the need for the *security of the State itself.*

American experience demonstrates that a written guarantee of fundamental rights has a tendency to engender an atomistic view towards society and the State which may at times prove to be dangerous to the common welfare. Of course, America has been saved from the dangers of such a situation by reason of her Judiciary propounding the doctrine of 'Police Powers' under which the Legislature is supposed to be competent to interfere with individual rights wherever they constitute a 'clear danger' to the safety of the State and other collective interests.

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself, apart from those exceptional cases where the interests of national security, integrity or welfare should exclude the application of fundamental rights altogether *[Arts.* 31A-31C].

CRITICAL OVERVIEW OF THE AFOREMENTIONED MAJOR LEGAL SYSTEMS

The primary impression which is formed by the study of the aforementioned major man-made legal systems in force in the contemporary world and which makes them diametrically different from the sacred law of Islam might be summed up in the following points:

(a) These laws are primarily based on the human ideologies; in other words, the chief source of those laws is the human thoughts, experiences and the social customs and traditions. The same fact is responsible for the changes, alterations and amendments these laws have been undergoing with the difference of times and climes. It is an established fact that human thinking and vision, his study and research can never be so vast and inclusive as to make laws cover the needs and requirements of all peoples in differing times and climes. Only for this simple reason even the stronger laws had to surrender to the wishes of the major influential human groups, which subjected those laws to their purposeful changes when they were found wanting in their capabilities to cover the needs of the time and age. If the man-made laws could satisfy the needs of one human group, it is necessarily unfit to the conditions of other human groups and classes; it may command importance in one age of history, but may lose it in other ages. In short, it turns out a plaything in the human hands.

(b) If this being the fact (and of course it is so), how far it is from reality to think about a nation that it is under the rule of law. If the man himself, or a class of the human beings, is the source of law, the real condition of that nation is nothing except that it is living under the governance of a law made enforced by a particular group or class of people. In sharp contrast, the source of the law of Islam and the fountainhead of its normative principles is the revelation from Allah. This is the principal distinction which lends it complete perfection, making it fully capable of meeting all requirements of all classes of people in all varying times and climes. In principle, the law of Islam needs not any type of arrangements. The country, nation or society living under the governance of the law of Islam could truly be termed to be under the rule of law.

(c) The constant process of changes, alterations and repeated amendments to the laws and their sources, the modus operandi adopted for the purpose and the monopolistic authority of the privileged group of human beings bring an acute feeling to the human mind that the man-made laws and positive legal systems are entirely incapable of creating a good and peaceful human society. So because the man-made law possesses no capacity to change the human conditions; the law itself undergoes changes, alterations and amendments. That is why all positive laws and man-made constitutions unexceptionally contain the article of how to change and amend the law; as if it is a presupposed fact that the law will never escape the process of changes and amendments. In other words, human laws are not creative by nature; they are applied; human law is a set of presumptions and presuppositions to be applied to human conditions and existing situations; it is utterly incapable of creating the situations and conditions. They are without an ability to orientate the human mind towards construction, to lay foundation of a new era and new history and cast the human thinking and behaviour into a perfect legal mould.

(d) A yet another defective feature of the positive law is that it commands no respect in the hearts of the people. Neither its followers nor its makers have the true feelings of respect towards those laws. No denying of the fact that the constitutions of some countries ask its people to be respectful towards them, as, for example did the law of the defunct USSR, yet this is just a formal and constitutional provision not based on some respectful feeling and reverence; it is primarily to minimise the possibilities of rebellion and discourage the law- breakers. This lack of respect has turned the law into a plaything in the hands of the law-making authorities, the majority of the nation or the law-making constitutional body often subjects it to changes and amendments according to its wishes and needs and may change even its most important articles. What is generally seen is that the laws made and passed by a regime are often abrogated by succeeding regimes. Changes in tendencies and inclinations are also a reason of change in the legislations. The ruling elite, generally speaking, follow the law of the land not regarding it as such a thing commending respect but as a strong tool to protect its specific and narrow interests and to use it more effectively for the protection of its vested interests.

Owing to this want of reverence and respect these man-made legal systems and positive laws can govern the bodies of the human beings but never their mind and hearts; these laws may have some programs for the collective life but nothing for the individual and personal life; they may be enforced on the public sphere of human life but not on the private sphere.

The law of Islam, contrariwise, through its intrinsic value, creates high reverence and great respect for itself by making its followers believe in the fact that this law is sacred, of Divine Origin. Based on this high concept of faith and belief, the law of Islam commands respect and reverence of its followers far deeper than the people have even towards their own honour and life. The marvelous doing of this feeling may be seen in every walk of the lie of a practicing believer where the law of Islam govern all spheres of his life whether it is public or private. It possesses a fuller light to illumine both the public and private sectors of human conduct and it equally commands both the heart and body. The laws created by man can never attain the sanctity in the eye of man himself which the law of the Creator, the Supreme Being, holds in his eye.

(e) The positive and man-made laws, generally speaking, is the negative product of the situations and conditions. In other words, the makers of those laws took reverse impact from the prevailing conditions. Instead of taking into account the real demands of those situations dispassionately the law-makers dealt those situations with the psychology of a strong negative reaction. The resultant fact was the negative attitude towards the concrete realities they were faced with and met the ground realities with rejection merely because of the fact that they were the product of a different environment, or they were born in an environment alien to those conditions. A deeper study of the constitutional histories of the world's major countries will reveal clearly the said psychology everywhere.

Take for example the constitution of the Great Britain, which holds key position in the whole constitutional history of the world; its historic background smacks of the same psychology. The age of the Tudor dynasty in Great Britain was marked by despoticism, and the legislators were driven under threats to the wishes of the kings. James I and Charles I, both from the Stuart dynasty, wanted to maintain their method of despotic governance. This brought an uncontrolled struggle between the kings and the parliament leading to a civil war which ultimately claimed the life of Charles I, and the institution of kingship was abolished. With the conquest of the parliament, Cromwell founded the common wealth and himself assumed the position of the dictator but failed to win the support of the masses and with his death the institution of kingship was re-established. During the reign of James II the struggle between the parliament and the king started again. In the struggle the king had to step down and the kingship got transferred to another dynasty, and the parliament regained its supremacy again. Then, with a great revolution a new constitution was prepared which, among other things, narrowed down the authorities of the sovereign and the institution of kingship was reduced to mere a nominal position to control the state affairs, although constitutionally the king was still supreme sovereign and the source of all authorities. Thus the contradiction between the precepts and practice, which glaringly appeared in the British constitution eventually, affected the whole constitution, and then all those constitutions and laws which were modeled after it.

Quite obviously, it was the Britishers' reaction to the institution of kingship the inhuman practices of and bitter experiences with which had obliged them to rebel against it. In their reaction, they denuded the constitution of the sovereign and the sovereign was reduced to mere nominal position. Principally, the Britishers were required to regulate the authorities of the sovereign and put checks on him; they chose to overturn the very institution of the sovereign instead, reducing the king to mere a constitutional authority.

The same turned out the fate of America in so far as its constitutional history. A systematic government was introduced to America as the British colony. The supremacy of a foreign sovereign gave birth to the concept of domestic sovereign. Opposite to the British mode of democracy, the Americans adopted the presidential mode of democracy. In 1776 the Second Continental Congress announced its freedom in the following words:

> *"We are marching ahead along the line of justice; we stand united and in possession of wider and larger means. In the hour of need we will receive help from other countries as well..... Our enemies have obliged us to lift arms....... We will use them to secure our freedom. Instead of living as their slaves, we are determined to welcome the death"*.[458]

After a prolonged struggle for freedom a new government came into being under the leadership of George Washington. The American mode of democracy was different altogether from that of Britain. In order to rid themselves of the tight noose of the British imperialism the Americans thought it better not to follow the British mode of democracy in developing their own constitution. The result is that while the British sovereign is powerless, and mere a constitutional ruler, the American president is invested with all authorities and practically the supreme authority of the State; the British imperialism is entirely ancestral and hereditary, the office of the presidentship of America, contrariwise, is as much common and democratic.

As far as Russia's socialist and communist government is concerned, it is the outcome of the negative reaction of the boiling conditions of the country. Prior to the Tsarism in Russia there existed small states with feudal system of government. Thereafter, the tyrannical era of Tsarism broke all previous records of despotism and absolutism resulting in so large scale of rebellion which ended in the birth of Communalism. All private properties and the sources of economy were declared the possessions of the State. No citizen of the Soveit State was permitted to have in his possession any type of property. Everyone was declared the worker of the State, entitled to have the wages proportionate to his labour.

The constitutional history of the Republic of Switzerland is not very much different from that of other countries of the world. Earlier, there existed smaller independent states called cantons. In the thirteenth century the Habsburg rulers of Australia tried to enslave them. The enormity of the situation hit them hard and prompt those independent small cantons to bring unity into themselves and form a united front against the common enemy. By dint of their united front they were able to repulse the foreign aggressions a number of time. Notably, their unity was limited only to the defence and in all other affairs of their cantons they were free. In 1798, Switzerland fell to the Napoleon invasion and the invader tried to remove the identities and personal characters of the cantons. This gave rise to a nationwide rebellion. Initially, the Switzerlands could only secure the internal freedom, but in 1815, that is, after the fall of Nepolean, it attained full independence. After a period of civil war a weaker federation came into being and after a time not much longer the Swiss smaller CANTONS were ultimately able to form a relatively stronger federation. In the constitution of the federation due care was paid both to the freedoms of the constituent states and the strength of the federation. This way the Swiss constitution moved into a direction which was different altogether from those in the past.

---

[458] Government of Four Major Countries, Pg. 6 Ed. 1972

In fact, reaction is nothing except adopting in the present a course of action which is entirely different from that of the past. This change, for the most part, is brought about by the bitter experiences and sufferings of the past. The reaction of this type is often so bitter that even the concept of the revival of the past is regarded a grave sin. The law of Islam and the system of Islamic government is entirely free from all such negative sensibilities and narrow-mindedness.

What we have put about the constitutional history of France points to the same natural reality. For centuries France has been the citadel of despot and absolute sovereigns and at the hands of those despot rulers it has suffered very much. Thereafter, passing through various stages, France could secure its freedom in 1944 and the French people, instead of the presidential mode of democracy, opted for the parliamentary mode of democracy, vesting the entire sovereignty in the people themselves. General de Gaulle wished to introduce the American mode of democracy to France, but the French people opposed tooth and nail the idea itself and the bitter memories of the past and their bitter experiences with the despot rulers precluded them from adopting the presidential mode of democracy.

As regards the Japanid constitution, prior to the world war II Japan was under the Meiji constitution, under which the Emperor was the supreme sovereign of the country. In the world war II Japan suffered a smashing defeat at the hand of the Allies headed by America, and General MacArthur, the supreme commander of the Allied forces, ordered the Japanid government to prepare a new constitution along the lines of the concept of democracy. The vanquished Japan had no option other than surrendering to the American command. Thus came into being Japan's constitution of peace. With this constitution in force, Japan cannot even think of taking revenge on America for its worst kind of aggressions against it.

This way the man-made law has always been a plaything in the hand of some other men themselves The Law revealed by Allah, in sharp contrast, can never be altered even by all human forces put together.

As for the constitution of Canada, Australia and India, in essence they are no more than the replica of the British constitution, the products of the local slavish mentality, with no status or identity of their own, and sharing the shortcomings and demerits on the same footing as thus their mother constitution. It will,therefore, be no proper use of time to comment on them each separately.

An analytical study of these major laws of the world reveals the fact that in the preparation of those legal systems a good deal of benefit has been derived from the laws of Islam. On the Indian constitution the impact of the Islamic legal system is quite obvious and easily recognisable. The terminology of the land revenue and judicial system is still largely Islamic.

While studying those laws we encounter an academic truth. That is, the law has basically been divided into two parts: primary or fundamental law, called constitution. This part, generally speaking, is not subjected to change and alterations. Its articles offer basic principles for the detailed legislations and situations and the faced conditions are considered in the light of those principles. In further legislative process the nature and temperament of the constitution is kept in view and no deviation is regarded permissible.

The second part is of the general laws which are derived from those fundamental principles. The latter one is subservient to the former one and this part may easily be subjected to amendments and changes. The division of the law into fundamental normative principles and the derived detailed legislations is purely the methodology adopted by the Muslims law experts. It is the Islamic law which introduced the concept of normative principles of law and the details of the law based on those principles. Prior to Islam the world was alien to this concept. Analogy and inference had no role in the interpretation of the law. It is only the law of Islam which originally has a division of normative principles and in order to satisfy the needs of guidance of human beings in all the succeeding ages those principles be applied to the new emerging situations.

The fact that this distinction between the Islamic law and man-made laws constitutes an outstanding feature of the Islamic Law is well supported by the fact that the inception of the judicial law in Britain dates back to the fifth century of the Christian era, yet there existed no such division at all. This division could be seen only in the laws of the later centuries. Is this not a clear indicant to that for this division the British law owes only to the law of Islam???

SECTION-FOUR

Glossary of Islamic Legal and General Juristic Terms

[*Ayyam*} *aI-Tashriq* signifies four days of the month of Dhu al-llijjah. viz. 10th through 13th.

'Arsh, literally means throne. The Qur'an refers to God as the Lord of the Throne (9:129). Mawdudi holds that the main purpose of mentioning God as the Lord of Master of the Throne in the Qur'an is to emphasize tha God is the effective controller of the whole universe, that He not only reigns but also rules.

'Ibadah, is used in three meanings: (1) worship and adoration; (2) obedience and submission; and (3) service and subjection. The fundamental message of Islam is that man, as God's creature, should direct his *'ibadah* to Him in all the above-mentioned meanings, and associate none in the rendering of it.

'udhr, excuse (for non-fulfillment of a contract of *ijara)*

'Umrah (Minor Pilgrimage) is an Islamic rite and consists of pilgrimage to the Ka'bah. It consists essentially of *ihrãm*, tawaf (i.e. circumambulation) around the Ka'bah (seven times). and sa'y (running) between Safa and Marwah (seven times). It is called minor Hajj since it need not be performed at a particular time of the year and its performance requires fewer ceremonies than the Hajj proper.

Aahaad, Solitary hadiths. A solitary hadith is the report narrated on the authority of the Prophet by one or more individuals, but whose chain of transmission does not fulfill the requirements of tawatur.

Abd, male slave

Abik, runway slave

Ada, custorn

Adab al-qadi the duties of the qadi, a subject of special works

Adadiyyat, countable things

Adl, (pl. udul q.v.), of good character

Afw, pardon

Ahakm sultaniyya, constitutional and administrative law, subject of special works,

Ahd, (covenant) in 2:27, for instance, refers to the command issued by God to His servants, This 'ahd consists of God's eternal command that His creatures are obligated to render their service, obedience and worship to Him alone.

Ahiyya, capacity

Ahkam, curles of Shariah

Ahl al-Dhimmah, (or *Dhimmis*) are the non-Muslims subjects of an Islamci state who have been guaranteed protection of their rights life, property and practise of their religion, etc.

Ahl al-kitab	unbelievers who posses a scripture
Ahliyyah	Legal capacity
Ahliyyat al-ada	Legal capacity for execution
Ajal	term,
Ajeer Khas	employee
Ajeer Mushtrak	independent contractor; shared worker
Ajir mirthl	equitable remuneration reasonable wages
Ajir	hired servant,
Ajnabi	stranmger third party
Ajr	wage (used in wider meaning in the Koran),
Ajr	rent. Wages, remuneration
Akar	immovables,
Akd	contract,
Akil	sane
Akila	(q.v for definition)
Al-ahkam, al-khamsa	the five legal qualifications

Al-Akhirah (Afterlife, Hereafter, Next World). The term embraces the following ideas :

Al-Akhirah, (After-Life, Hereafter, Next World). The term embraces the following ideas:

Al-ba'ir al-sharid	stray animal
Al-darb fil ardh	to make journey
Al-Hajr	interdiction; authoritive prohibition
Al-Istidlaal al-Murasal	Unrestricted reasoning; rea-soning or argumentiaon based on unrestricted interests.
Al-Kulliyyat al-Khamsah	this term refers to the five universal and most general higher objectives *(maqasid)* for the preservation and promotion of which the *Shar'ah* commands and rules have been promulgated. They constitute what is indispensable *(daruri)*, for human life and existence. They consist of the protection of religious faith (hifz al-din), the protection of human life (hifz al-nafs), the protection of intellect (hifz al-aql), the protection of progeny (hifz al-nasl) and the protection of property (hifz al-mal).
Al-maal	property, wealth
Al-malaqih	sperm
Al-Masalih al-Mursalah	Unrestricted interests (sometimes referred to also as public interests). Interests which are not explicitly identified by any text in the Qur'an or Sunnah but which are generally agreed upon based on circumstances which arise in human society. Examples of unrestricted interests include the paying of roads, the setting up of administrative office to handle public needs the use of traffic signals, the construction of sewers and waste disposal facilities, etc.
Al-Muatah	Fixed price sale; a transaction in which the buyer gives the price of the merchandise to the seller and the seller give the merchandise to the buyer without uttering words to indicate either an offer or acceptance.
Al-Munasabah	Appropriateness. The description of a situation in which a legal ruling and the situation upon which it is based are appropriate to

each other in such a way that the ruling leads to the preservation of an interest which in explicitly recongnized in the source texts for Islamic Law (i.e., the Qur'an and the *Sunnah*) and is supported by ikma, or the consensus of the Muslim community. An example of appropriateness would be the prohibition of alcoholic beverages (legal ruling) based on the fact that such beverages cause inebriation (the situation upon which the ruling is based), where the interest being preserved through the prohibition is the preservation of one's faculty of reason.

Al-nafs, life

Al-Ruya, examination inspection

Al-Taslim, delivery

Al-wasiyyah, bequest

Al-Zahiriyyah, Al literalist Islamic legal school, founded in 9th Century Iraq by Dawud Khalaf and later championed by Ibn Hazm, which insists on strict adherence to the literal or apparent meaning *(zahir)* of the Qur'an and Hadith as the only source of Muslim Law.

Ama, female slave

Amaal, acts

amal of Median F; Judicial practice *Aman*, temporary safe-conduct

Amal practice,

Amana, trust deposit, fiduciary, relationship: in the Koran 12; in Islamic law,

Amanah, trust

Amd deliberated intent,

Amil al-suk, inspector of the market n.1

Amin , a person in position of trusy (*amana*),

Amr, command

Ansar means 'Helpers'. In Islamic parlance the word refers to the Muslims of Madianah who helped the Muhajirun of Makkah in the process of the latter's settling down in the new environment.

Aqd mu'allaq, contingent transcation

Aqd munjaz, immediately enforceable contract

Aqd, Transcation; deal

Aqidaan, contracting parties

Aqil, sane

Aql 'reason', the result of systematic thought,

Aql, Sanity

Arabun, earnest money,

Ariyah, Commodate loan

Ariyya, loan of non-fungible things

Arsh, a penalty for certain wounds,

Arus resmi, a tax on brides in the Ottooman Empire,

Asaba, (roughly) the agnates,

Ashab al-Suffah, consisted of about three or four hundred Companions who spent most of their time in the company of the Prophet (peace be on him). They acquired knowledge and had dedicated themselves wholly to serving Islam.

Ashbah wa-nazair, similiarities the systematic structure of the law subject of special works

Asil, the principal; principal, debtor

Asl, Foundation; basis

Asl, Principle

Asl, the nature of a transaction (opp. wasf)

'Asr Prayer is one of the five obligatory Prayers and is performed after the time for the Zuhr Prayer (q.v.) ends before the time for Maghrib Prayer begins. The time for ' Asr Prayer is reckoned to start when the shadow of an object exceeds its size (according to the Hanafi school, when the shadow of an object becomes double its size), and ends with sunset.

Atah, Lunacy, partial insanity

Awl, reduction of shares of heirs

Ayah, (pl. *ayat*), means a sign (or 'token') which directs one to something important. In the Qur'an the word has been used in four different senses: (1) sign or indication; (2) the phenomena f the universe (called ayat of God for the reality to which the phenomena point is hidden behind the veil of appearances); (3) miracles performed by the Prophets; and (4) individual units (i.e. verses) of the Book of God.

Ayan, Plural of ayn

Ayn thing substance

Ayn, Substance, determinate property

Azimah, This term indicates the binding force of a Shariah rule without consideration of mitigating hardship.

Badal consideration

Baligh, Person who has attained puberty

Balihg of age

Bara'a, (q.v of definition)

Batil invalid, null and void

Batil, Void, invalid

Batin, the inward state

Bay al uhda, bay al wafa sale of ral property with the right of redemption

Bay al-araya, a contract of barter in dates

Bay al-dayn bil dayn exchange of obligation for obligation

Bay sale, exchange barter

bay' atan fi baya double sale a group of devices for evading the prohibition of interest.

Bay'al-amanah, Turst sale

Bay'al-Aynah, Sale on credit; a transaction in which an item is sold on credit for one price, after which the person who originally sold it buys it back in cash from the person to whom be sold it for a lower price.

Bay'al-fasid, Irregular sale

Bay'al-gha'ib, Sale for something not seen by the par ties to contract

Bay'al-Gharar, A term referring to a transaction in-volving buying and selling in which there is an element of uncertainty concerning the price, the merchandise concerning the price, line for payment and/or delivery, or the ability to deliver the merchandise.

Bay'al-haml, Sale of facts in the womb.

Bay'al-hasat, sale taking place through pebbles

Bay'al-inah, Buy-back agreement

Bay'al-iuzaf, Sale of food stuff at random

Bay'al-kaali bi al-kaali, Sale of credit for credit

Bay'al-ma'dum, Sale of non-existent thing

Bay'al-majhul, Sale in which the object of sale its price the time of its payment and delivery remains unknown

Bay'al-muhaqalah, Sale of wheat in ear of grain.

Bay'al-mukhadarah, Sale of fruits on tree before their benefit is evident

Bay'al-munabadhah, Sale of fresh fruit in exchange of dry fruits

Bay'al-mutlaq, Sale of commodity with money

Bay'al-muzabanah, Sale of fresh fruits for dry fruits.

Bay'al-salam, Sale with advance payment for future delivery of goods

Bay'al-wafa, Archaic sale fro redemption

Bay'ul-mulamasah, Sale that is effective by touching a commodity

Bay'wa salaf, Selling and landing

Bayt al-mal public treasury

Bayt'al-mal, Treasury

Bayyina evidence

Bughat rebels

Buy'ual-ayn, Sale of Objects

Daam'n, Surety, gurantee

Daf noxae diditio

Dallas, to conceal a fault or defect

Daman liability

Daman, A guarantee; one type of guarantee under Islamic Law is the requirement that if Party A's property is damaged while in Party B's possession, Pary B must restore to Party A something indentical to the damaged object, or, if this is not possible, its monetary value. Other types of guarantees are also available in Islamic Law for differing situations.

Damin al-aml, Liability of a partner to complete the work accepted by either partner.

Damin, liable

Dar al-harb, enemy territory

Dar al-Islam, the territory of the Islamic state

Darak, default in ownership

Darbat al-gha'is, Divers dive

Darurah, Necessity. A situation that requires the mitigation of a rule.

Daruriyyat (sing Daruir), the things that are vital and indispensable for life and existence and constitute the ultimate higher objectives (maqaasid) of Islamic law. They occupy the higher position in the hierarchical order of Islamic via.

Daura, necessity as a dispensing element

Dawa, claim lawsuit

Dayn, debt, claim, obligation,

Dayn, Receivable debt; indeterminate property

Dbariab (Plur Dhara'i), Means to an end. It may also be called wasilah.

Dhawu l-arham (roughly) the congnates

Dhikr, means remembrance. In the Islamic context, it is used the sense of 'remembrance of God'. In verse 2:199, dhikr refers to remembering God on a specific occasion, namely during the Pilgrimage at Mina.

Dhimma, engagement undertaking, care a duty of conscience obligation.

Dhimmis non-Muslims who are protected by a treaty of surrender

Dhukr, or *dhukr haqq*, (pl. *adhkar*, *adhkar huquq*) written document

Dhukul consummation of marriage

Dhul-yad possessor

Din has the core meaning of obedience. As a Qur'anic technical term, din refers to the way of life and the system of conduct based on recognizing God as one's sovereign and committing oneself to obeying Him. From the Islamic perspective, trie din consists of man's living in total submission to God, and the way to do so is to accept as binding the guidance communicated through the Prophets.

Din, the core meaning of *din* is obedience. As a Qur'anic technical term, din refers to the way of life and the system of conduct based on recognizing God as one's sovereign andcommitting oneself to obey Him. According to Islam, turn din consists of living in total submission to God, and the way to do so is to accept as binding the guidance communicated through the Prophets.

Diwan, army, list records of the tribunal

Diya, blood-money

Diyana conscience forum internum

Diyat, Blood money

Fadl aml bila iwad unjustified enrichment

Fahish, Grave

Fahsha' see Fawahish.

Fakih (pl. *fukaha*) the specialist in *fikh*

Falah means success and prosperity. It is used as an antonym of khusram falah, therefore loss and failure. To say that someone has acquired falah, therefore, amounts to saying that he has achieved his objective, that he has attained prosperity and well-being, that his efforts have borne furit.

Faqih (pl. Fuqaha), A scholar of Islamic jurisprudence who concern himself with the details of Islamic legal rulings and their legal bases.

Faraid, the portions allotted to the heir succession in general

Fard duty

Fard fixed share of an heir

Farz, an obligatory religious duty

Farz-e-ain, all-binding duty

Farz-e-kifaya, non-all-binding

Fasad al-zaman the corruption of contemporary condition

Fasid, defective voidable

Fasid, Irregular

Fasik siner opp. *adl*

Fasiq, transgressor, evil-doer, disobedient.

Faskh cancellation

Fatwa (pl. Fatawa), a formal legal opinion issued by a mufti (ijurisconsult) based on a question posed to him by an inquiring person (called mustafti)

Fatwa the consideration legal opinion of a *mufti*

Fawahish, sing. fahishah, applies to all those acts whose abominable character is self-evident. In the Qur an all extra-marital sexual relationships, homo-sexuality, nudity, false accusation of unchastity, and taking as one's wife a woman who had been married in the past to one's father are specifically called *fawahish.*In *Hadith,* theft, taking intoxicating drinks and begging have also been characterized as *fawahish* as have several other brazenly evil and indecent acts.

Fida for definition

Fikh the science of the *sharia* the sacred Law of Islam

Fiqh, The study and application of Islamic legal rulings as based upon detailed eveidence; the corpus of practical legal rulings in Islam.

Fiqh,which literally means ' understanding of a speaker's purpose from his speech', technically refers to the branch of learning concerned with the injunctions of the Shari 'ah relating to human actions, derived from the detailed evidence pertaining to them.

Fisabil Allah (in the way of Allah) is a frequently used expression in the Qur'an which emphasizes that good acts ought to be done exclusively to please God.Generally the exclusively to please God. Generally the expression has been used in the Qur an in connection with striving or spending for charitable purposes.

Fisq transgression; consists of disobedience to the command of God.

Fitnah, has been used in the Qur'an in two meanings. It refers, firstly to persecution, to a situation in which the believers are harassed and intimidated because of their religious convictions. Secondly, it refers to the state of affairs wherein the object of obedience is other than the One True God.

Fitrah, The original God-given nature of man

Fuduli unauthorized agent

Fuduli, Self imposed agent an authorized agent

Fukaha (pl of *fakih*) the religios lawyers of Islam

Furuh the branches positive law as opposed to *usul*

Furuk legal distinction subject of special works.

Gha'ib absent

Ghaban Fahish, Exorbitant loss suffered by a party to a contract or excessive lesion.

Ghabn fahish grave deception fraud

Ghabn, Lesion damage

Ghair lazim, Non-binding

Ghair munjaz, Minor not possessed with discretion

Ghalla proceeds

Ghanima booty

Gharar risk, hazard, uncertainity,

Gharar, uncertainty or risk involved in a transaction.

Gharar, Uncertainty; indeterminacy

Ghasb usurpation

Ghasb, Usurpartion

Ghasib usurper

Ghasib, Usurper

Ghayb literally means " hidden, covered, or concealed". As a term, it means all that is unknown and is not accessible to man by the means of acquriring knownledge avaiable to him. *Ghayb* therefore refers to the realm that lies beyond the ken of perception.

Ghayr mal'um not known

Ghayr mamluk that in which there is no ownership

Ghurra indemnity for causing an abortion

Habs imprisonment

Habs retention of a thing in order to secure a claim lien.

Habs, Trust. It is synonymous with the term waqf.

Habs, Turst. It is synonymous with the term waqf.

Hadan, care of the child by the mother,

hadd (pl. *ahadith),* a fixed punishment for certain crimes,

Hadd (plur. Hudud), Limit, bound. In the Islamic penal code, he term Hadd refers to the set of punishments that have been enunciated and determined in the Shariah textual sources (i.e., the Qur'an an Sunnah of the Prophet) both in the terms of their nature, scope and quantity.

Hadd (plur. Hudud), Limit, bound. In the Islamic penal code, the term Hadd refers to the set of punishments that have been enunciated and determined in the Shariah textual soruces (i.e., the Qur'an and Sunnah

Hadd, punishment prescribed in the Qur'an or Sunnah

hadith (p1. *ahadith),* a formal tradition deriving from the Prophet

Hadith literally means communication or narration. In the Islamic context it has come to denote the record of what the Prophet (peace be on him) said, did, or tactitly approved. According to some scholars, the word *hadith* also covers reports about the sayings and deeds, etc. of the Companions of the Prophet in addition to those of the Prophet (peace be on him). The whole body of traditions is termed *Hadith* and its science 'IIm al-Hadith.

Hadith, the word hadith literally means communication or narration. In the Islamic context it has come to denote the record of what the Prophet (peace be on him) said, did, or tacity approved. According to some scholars, the world hadith also covers reports about the sayings and deeds, etc. of the Companions of the Prophet in addition to the Prophet himself. The whole body of Traditions is termed Hadith and its science 'Ilm al-Hadith.

hadr, hadar, not protected by criminal law,

Hajiyyat, Necessary things whose realization is intended by the Shari'ah for the purpose of removing hardship from human life. Next to the daruriyyat that constitute indispensable objective of Islamic law and whose neglect cause severe harm to human life and existence, the Hajiyyat are needed for maintaining an orderly society properly governed by the law.

Hajj (Major Pilgrimage) is one of the five pillars of Islam, a duty one must perform during one's life-time if one has the means to do so. It resemles 'Umrah in some respects, but differs from it insofar as the former can be performed during certain specified dates of Dhu al-Hijjah alone. In addition to *tawaf* and say (which are also required for '*Umrah*), there are a few other requirements but especilly 'standing' (*wuquf*) in 'Arafat during the day-time on 9th of Dhu al-Hijjah. For details of the rules of *Hajj*,see the relevant sections of the books of *Fiqh*.

Hajj, (Major Pilgrimage) is one of the five pillars of Islam, a duty one must perform during one's life-time if one has the financial differs from it insofar as it can be performed during certain specified dates of Dhu al-Hijjah alone. In addition to tawaf and sa'y (which are also required for 'Umrah), there are a few othe requirements but especially one's 'standing' (i.e. stay) in 'Arafat during the day-time of 9th of Dhu al-Hijjah. For details of the rules of Hajj, see the books of Fiqh.

hajr, interdiction,

hakam, habitrator

hakk adami (private claim as opposed to a right or claim of Allah)

hakk Allah right or claim of Allah opposed to a private claim

halal not forbidden

Hanif, pl. Hunafa' was the generic appellation of those persons of Arabia practice, affirmed claiming to follow the Abarhmic faith. On the advent of the Prophet (peace be on him) quite a few of them embraced Islam.

haram, forbidden

harbi hawal transfer of debt

Hashr, literally means 'to gatjher' , signifies the doctrine that with the blowing of the Second Trumpet all those who had ever been created will be resurrected and brough forth to the Plain where all be made to stand before God for His judgement.

Heelah (pl. Hiyal), Stratagem, artifice; an attempt to exploit that which is legitimate for an illegitimate purpose or aim; or, that which appears to be legitimate but is not.

hiba, donation

Hijabah and ***Siqayah*** (q.v.), it was considered an important and honoured function in Makkah on the eve of Islam.

Hijrah signifies migration from a land, where a Muslim is unable to live according to the precepts of his faith to a land where it is possible to do so. The *hijrah par excellence* for Muslims is the *hijrah* of the Prophet (peace be on him) which not only provided him and his followers refuge from persecution, but also an opportunity to build a society and state according to the ideals of Islam.

Hikmah, Wisdom. In Islamic jurisprudence, the term hikmah refers to the wise purpose or objective for which a Shari'ah command has been instituted, which revolves around bringing good to human beings and/or preventing harm from them. It may be used inte-changeably with the term maslahah.

hirz, cutody of things

hisba the office of the *mushtasib*

Hiyah (sing. Heelah), Tricks, stratagems, artifices. This term refers to legal devices used to exploit that which is legitimate for an illegitimate purpose or end; or, that which appears to be legitimate but is not.

Hiyal legal devices evasions

Hukm (pl. *ahakm*) qualification see also *al-ahkam al-khamsa*

Hukm al-hawz hukm (ahkam) al-man or alman's hukm al-taught, tribal, customary law of the Bedouins in Arabia

Hukm Shar'i, the obligation-creating rule. The primary rule of the legal system. According to the majority of legal theorists, the hokum taklifi consists of wajib (obligatory act), mandub (recommended act), haram (prohibited act), makruh (disapproved act), and mubah (permitted act).

Hukm Wadhih, the declaratory rule. A secondary rule of the legal system that facilitates the operation of the primary rules. It includes sabab (cause), shart (condition) and maani (obstacle or imperdiment)

Hukm, Rule, injunction, prescription.

Hukuma a penalty for certain wounds

Huquq (sing. Hqq), Rights, entitlements

Huquq al-Abd, The rights of man

Huquq Allah, The rights of Allah

Hurr free person

Huruf muqatta' at are a group of letters with which several surahs of the Qur'an open. The muqatta at were commonly used by the Arabs at the time of the advent of the Prophet (peace be on him) and hence they caused no agitation among the non-Muslim audience of that time. This literary style later fell into disuse and hence the commentators of the Qur'an have come to disagree regarding their exact signification. It is obvious, however, that deriving guidance from the Qur'an does not depend on grasping the meaning of these letters.

I'tikáf refers to the religious practice of spending the last ten days of Ramaçlãn (either wholly or partly) in a mosque so as to devote oneself exclusively to worship. In this state one may go out of the mosque only for the absolutely necessary requirements of life, but one must stay away from gratifying one's sexual desire.

'Ibadah is used in three meanings: (1) worship and adoration; (2) obedience and submission; and (3) service and subjection. The fundamental message of Islam is that man, as God's creature, should direct his '*ibadah* to God in all the above-mentioned meanings of the term, and in rendering it associate none with God.

Iblis literally means thoroughly disappointed; one in utter despat′. In Islamic terminology it denotes the jinn. who refused the command of God to prostrate before Adam out of vanity. He also asked God to allow him a term when he might mislead and tempt mankind to error. This term was granted to him by God whereafter he became the chief promoter of evil and prompted Adam and Eve to disobey God's order. F-Ic is also called al-Shay tan (Satan). He is possessed of a pecific personality and is not just an abstract force.

Iblis literally means 'one thoroughly disappointed; one in utter despair'. In Islamic termivology it denotes the *jinn* (q.v.) who out of arrogance and vainglory, refused the command of God to prostrate before Adam. He also asked God to allow him a term during which he might mislead and tempt mankind to error.This team was granted to *lbis* by God whereafter he became the cheif promoter of evil and prompted Adam and Eve to disobey God's order. He is also called al-*shaytan* (Statan). He is possessed of a specific personality and is not just an abstract force.

Ibra acquittance

Idda, waiting period of a woman after termination of marriage by divorce or death of the husband

'Iddah denotes the waiting period that a woman is required to observe as a consequence for the nullification of her marriage with her husband or her husband's death. During this period she may not marry. The waiting period after a divorce is three months and after the death of her husband is four months and ten days.

Idhn, permission extension of the capacity to dispose

Ifa fulfilmnt of an obligation

Ihram refers to the state in which a Pilgrim is required to honour certain restrictions from the commencement of ***ihram*** until such time that the religious law releases him from the restrictions imposed by ***ihram*** . ***Ihram*** is so called in view of the numberous prohibitions that ought to be observed (e.g. abstention from all sexual acts, from the use of perfume, from hunting or killing animals, from cutting the beard or shaving the head, cutting the nails, plucking blades of grass or cutting green trees). ***Ihram*** also requires male Pilgrims to cover their body with seemless garments, rather than wear tailored clothers, and to leave the head uncovered. As for female Pilgrims, ***ihram*** requires them to dress according to ordinary rules of the ***Shari*** ' *ah* provided they keep their face uncovered.

Ihram, denotes the state of consecration which is essentially required for performing Hajj and 'Umrah. The outward garb which consists in the case of men of just two sheets of cloth instead of tailored clothes is one of the conditions of ihrdni hut not identical with it. Apart from donning that garb, one is required to pronounce *Talbiyah* (Labbayk Allãhutnma Labbayk . .)

Ihsan, literally denotes doing something in a goodly manner. When used in the Islamic religious context, it signifies excellence of behaviour arising out of a strong love for God and a profound sense of close relationship with Him. According to a Tradition the Prophet (peace be on him) defined ilzsãn as worshipping God as though one sees Him.

Ihtiyat religious precaution

Ihya al-mawat cultivating waste land

IIa' denotes a husband's vow to abstain from sexual relation with his wife. The maximum permissible limit for abstaining from such relations under that vow is four months, after which the marriage becomes void.

Ijaab, Making offer of something to another party.

Ijab, offer as a constitutive element of a contract)

Ijara hire and lease

Ijaza approval *ratihabitio*

Ijma, consensus *ijma ahl al-Madina,* consensus of the scholar of Medina

Ijtihad, effort the use of individual reasoning also ijtihad al-ra'y later restricted to the use of kiyas

Ijtihad, Independent reasoning. Technically, this term refers to the effort exerted by a qualified refers to the effort exerted by a qualified jurist (faqih/mujtahid) to arrive at the meaing intened by the lawgiver in the textual sources of Islamic Law and apply it to its subject-matters in the real lfie of human beings.

Ikala, reversal of sale

Ikhtilaf disagreement

Ikhtiyar authority

Ikrah duress

Ikrar, acknowledgment confession

Ila, oath of abstinence from intercourse by the husband

Ila' denotes a husband's vow to abstain from sexual relations with his wife. The maximum permissible limit for abstaining from sexual relations in wedlock under such a vow is four months, after which f1ã would automatically mean repudiation of the marriage.

Ilka bil-hajar an aleatory transaction

Illah, Ratio legis, cause, reason, rationale, considered to be the most important pillar of qiyas, illah is defined as being the constitutes the ground or basis of a Shari'ah rule.

Imam leader calip

Imam ma'sum, infallible *imam* title assumed by Ibn Tumart

Imda, ratification

In the state of ihrãrn the pilgrim is required to observe many prohibitions: e.g. he may not hunt, shave or trim his hair, shed blood, use perfume, or indulge in sexual gratification.

Ina a device for evading the prohibition of interest.

Injil signifies the inspired orations and utterances of Jesus (peace be on him) which he delivered during the last two or three years of his earthly life in his capacity as a Prophet.The ***Injil*** mentioned by the Qur'an should, however, not be identified by the four Gospels of the New Testament which contain a great deal of material in addition to the inspired utterances of the Prophet Jesus (peace be on him). Presumably the statements explicitly attributed to Jesus (peace be on him) constitute parts of the true, original ***Injil*** .

Injil, signifies the inspired orations and utterances of Jesus (peace be on him) which he delivered during the last two or three years of his earthly life in his capacity as a Prophet. The Iiijil mentioned by the Qur'ãn should, however, not be identified by the four Gospels of the New Testament which contain a great deal of material in addition to the inspired statements of the Prophet Jesus. Presumably the statements explicitly attributed to Jesus (peace be on him) constitute parts of the true, original Injil. It is significant, however, that the statements explicitly attributed to Jesus in the Gospels contain substantively the same teachings as those of the Qur'an.

Ishara ma'huda, gesture conclusive act

Ishtihbab preference a synonym of *istihsan*

Ishtirak join ownership

Iskat relinquishment

Isnad the chain of transmitters of a tradition of a tradition

Istibra waiting period of a female slave after a change of owner

Istidlaal, The literal meaning of the term istidlal is to seek evidence (dalil). In the context of Islamic alw, it is the pursuit of legal evidence, be it textual or otherwise, on the basis of which one may arrive at a sound ruling or judgment on this or that questions or situation.

Istifa receiving (taking possession)

Istighlal acquisition of proceeds

Istihkak vindication

Istihsan approval a discretionary opinion in breach of strict analogy

Istihsan, Juristic preference. A decision, in the process of arriving at a legal decision, t refrain from applying to a give situation the same ruling which has been applied to analogous situations in favor of another ruling which

Istila occupancy of a *res nullius*

Istina contract of manufacture

Istirdad vindication

Istishad a method of legal reasoning particular to the Shafi I school and to the Twelver Shiites

Istislaah, the act or process of reasoning on the basis of maslahah.

Istislah taking the public interest into account

It is significant that the statements explicitly attributed to Jesus in the Gospels contain substantively the same teachings as thoes of the Qur'an.

Itk I'tak manumission

Iwad countervalue

Jahiliyah denotes all those world-views and ways of life which are based on rejection or disregard of heavenly guidance communic ated to mankind through the Prophets and Messengers of God; the attitude of treating human life — either wholly or partly — as independent of the directives of God.

Jahiliyah on the eve of Islam all those world-views and ways of life which are based on rejection or disregard of heavenly guidance communicated to mankind through God's Prophets and Messengers of God; the attitude of treating human life, either wholly or partly, as independt of the directives of God. *Jahiliyah* also has a temporal signification; it refers to the pre-Islamic period of Arabia when Divine Guidance was not available to people.

Jaiz allowed unobjectionable

Jam for definition

Jama, Union, gathering together or all comprehensives. A term used in the realm of Sufism to refer to a spiritual state in which the individual has so fully concertrated himself or herself on the Divine that he/she is no longer aware of any separatin between the Divine and the created.

Jariya female slave

Jibillah, the natural state according to which Allah has created man.

Jihad means 'to strive or exert to utmost'. The word *jihad* implies the existence of resistance against whom it is necessary to engage in struggle. ***jihad*** embraces all kinds of striving alimed at making the Word of God supreme in humans. It includes the effort to subdue one's carnal self and make it subservient to God's Will. The juxtaposition of the expression ***fi sabil Allah*** With *jihad* also underlines that a person's intention in making *jihad* should be to seek the good pleasure of God rather than for renown or worldly benefits.

Jinaya (pl *jinayat*) tro delict

Jinn are an independent species of creation about which little is known except that unlike man, who was created out of earth, the *jinn* were created out of fire. But like man, a Divine Message has also been addressed to them and they too have been endowed with the capacity, again like man, to choose between good and evil, between obedience or disobedience to God.

Jizya poll-tax

Ju'l reward for bringing back a fugitive slave

Juzaf undetermined quantity

Kabd, taing possession

Kada judgment given by the *kadi forum externum*

Kada, payment of a debt

Kada, the district circumscription of a *kadi*

Kadhf false accusation of unchastely (unlawful intercourse)

Kadi l-jama'a a judicial office in Islamic Spain

Kadi l-kudat the chief *kadi*

Kadi the Islamic judge

Kafa'a equality by birth

Kafala seuretyship

Kaffara religious expination

Kafil guarantor surety

Kafir, unbeliever

Kahin soothsayer

Kanun law used of secular acts the administrative law of the Ottoman Empire

Kanun-name a text containing one or several *kanuns*

Kard loan of fungible objects for consumption.

Kasama a kind of compurgation.

Kasd aim, purpose

Kasim divider of inheritances

Kat al-tarik, highway robbery

Katib secretary of the kadi clerk of the court

Katl, homicide

Kawad retaliation

Kawaid rule, the technical principles of positive law, subject of special works

Khalifah or vicegerent is one who exercises the authority delegated to him by his principal, and does so in the capacity of his deputy and agent. This term has been used in the Qur'an with reference to man: 'Just think when your Lord said to the angels: Lo! I am about to place a vicegerent on earth . . . ' (2: 30).

Khalwa privacy, (between husband and wife)

Kharaj land-tax

Kharij stranger, third party

Khasm, party to a lawsuit

Khata, mistake

Khiyana, embezzlement

Khiyar al-shart, stipulated right of cancellation

Khiyar, optio, right of rescission

Khul' signifies a woman's securing the annulment of her marriage through the payment of some compensation to her husband. For details see Sürah 2, n. 252 (p. 178).

Khul A from of divorce

Khula, Divorce at the instance of the wife in return for a monetary compensation paid to the husband.

Khusuma litigation

Kima, value

Kimi non-fungible

Kiraya allusion, implicit declaration

Kisas, retaliation

Kisma, division

Kiyas, analogy, parity of reasoning

Kubul acceptance (as a consecutive element of a contract)

Kufr: its original meaning is 'to conceal'. This word has been variously used in the Qur'ãn to denote: (1) state of absolute lack of faith; (2) rejection or denial of any of the essentials of Islam: (3) attitude of ingratitude and thanklessness to God; and (4) non-fulfilment of certain basic requirements of faith. In the accepted technical sense, kufr consists of rejection of the Divine Guidance communicated through the Prophets and Messengers of God. More specifically, ever since the advent of the last of the Prophets and Messengers, Mubammad (peace be on him), reject ion of his teaching constitutes Kufr.

Kulliyaat (plur. Kulli, meaning universal) the universal things constituting the ultimate higher objectives of Islamic Law.

Kursi, (see verse 2: 255), has been variously interpreted by Muslim scholars. In the opinion of the author, it signifies sovereignty, dominion and authority. As for other Muslim scholars, some have considered it to signify God's knowledge. A number of scholars, however, consider the Kursi (literally, that which one sits on) a reality rather than a mere figurative expression. These scholars emphasize, however, that both the nature and modality of God's Kursi are not known to man.

Lakit, foundling

Lazim, binding

lddah denotes the waiting period that a woman is required to observe as a consequence of the nullification of her marriage with her husband or because of the husband's death. For details see verses 2: 228 ff. along with relevant notes.

Li'an, Oath of condemnation, imprecation. Disavowal of paternity by mutual oath of both spouses. This oath is resorted to by the husband in refutation of an accusation or qadhf by his wife, and by the wife in refutation of an accusation of adultery by her husband.

Lian, for definition

Liss, robber

Liwa' means banner, flag, standard. In pre-Islamic Makkah, it was an honoured function assigned to one of the clans of Quraysh which signified its position of leadership on the battlefield.

Lukata, found property

Ma'din mine

Ma’rüf refers to the conduct which is reckoned fair and equitable by the generality of disinterested people.

Madhhab madhahib school of religious law

Madhun, a slave who has been given permission to trade

Mafkud, missing person

Mafsadah, Evil, harm. It is the opposite of maslaha.

Maharim, see *mahram*

Mahdar minutes the written record of proceedings before the *kadi*

Mahr (bridal gift) signifies the amount of payment that is settled between the spouses at the time of marriage, and which the husband is required to make to his bride. Mahr seems to symbolize the financial responsibility that a husband assumes towards his wife by virtue of entering into the contract of marriage.

Mahr, nuptil gift fair, or average *mahr* defined

Mahram pl. *maharim* a person related to another within the forbidden degress

Majhul, unknown

Majlis session, meeting of the praties

Majlis, sitting. In the Fiqht terminology the getting togather of te transacting parties.

Majnun insane

Makil, *kayli*, things that can be measured

Makruh, reprehensible disapproved

Makruhe Tahreemi, practice held displeasing; forbidden by less than Haraam

Maks, market dues in pre-Islamic Arabia, illegal taxes in Islamic

Makul, reasonable the resul of systematic thought

Mal mankul, mal nakli, movable

Mal, res in commercio

Malak means message-bearer’ and is used in the Islamic texts for angels.

Malasa the revese of uhda

Malik owner

Maluk, male slave

Malum known, certain, (opp. *ghayr, malum, majhul,*)

Mandib, recommended

Manfa’a pl *manafi* proceed, unfruct

Mannat, Basis, ground. This term is used synonymously with the term illah.

Maqasid (sin Maqsad), Literally, objectives, or purposes, this term is frequently used alone to refer to the higher objectives of Islamic Law in general, that is, maqasid al-Shari’ah.

Marsum, decree, used of modern secular acts

Ma'ruf refers to the conduct which is instinctively regarded as good and fair by human beings in general.

Mashru, recognized by the law

Maslaha the public interest

Maslahah, Interset, benefit, something good.

Maslihe Mursalah, Interset or benefit that has not been regulated or qualified by a specific text and is based on a general principle of the Shari’ah or its spirit.

Mastur for definition

Masum, inviolable protected by criminal law,

Matuh, idiot

Maud mutakarib things that can be conted

Mawal the patron, or the client

Mawkuf in abeyance

Mawlawi, term used in India for a Muslim scholar or religious law

Mawzun, *wazni*, things that can be weighed

Maysir, a game of hazard

Mayta, animals nor ritually slaughtered

Mazalim, see *nazar fil-mazalim*

Milk al-amma, public property

Milk, ownership (also in a wider meaning)

Miqat (p1. mawaqiEt) denotes the points which an outsider intending to perform Pilgrimage may cross only in the state of consecration (ihram). These points were fixed according to directions from God.

Mithl, just mean, average fair,

Mithli, fungible

Mu'allal, A Shari'ah rule whose illah can be known either textually or by rational methods that are detailed by legal therists under the heading of masalik al-illah (methods of establishing the effective cause) in conjunction with the discussion on qiyas.

Mu'amalat, Social dealings, transactions.

Muakala, a contract of berter in corn

Muamala, transaction euphemistic term for a device for evading the prohibition interest

Muamalat, pecuniary, transactions

Muawada maliyya, exchange of monetary assets

Mubaah, permissible

Mubaraa, a from of divorce

Mubha, indifferent (neithr obligatory/ recommended nor reprehensible / forbidden)

Mubham, ambiguous declaration

Mudabbar, a slave who has been manumitted by *tadbir*

Mudaraba sleeping partnership

Mudda,a alayah, defendant

Mudda'i, claimant, plaintiff

Mufawada, unlimited mercantile, partnership

Muflis, bankrupt

Mufti, a specialist in religious law who gives an authoritative opinion

Muhallil, A man who weds an irrevocably divorced woman (mabtutah) with the intention of divorcing her so that her previous husband can marry her again. This type of marriage contract is called nikah al-tahlil and is prohibited in the Shari'ah.

Muhsan (for definition)

Muhtasib the Islamic inspector of the market

Mujtahid, a qualified lawyer who uses *ijtihad*

Mukallaf, (fully) responsible

Mukallid, a lawyer who uses *taklid*

Mukatab, manumission by contract

Mukatab, the slave who has concluded this contract

Mukhratara, a device for evading the prohibition of interest

Mukhtakir, speculator on rising prices of food,

Mulamasa, an aleatory, transaction

Mulazama, personal supervision (of defendant by plaintiff)

Mumayyiz, intelligent, discriminating minor,

Munaasabah, Appropriateness, suitability. In the technig cal language of the legal theorists (ustiliyyaun), it is a meaning in a person's act that necessitates the obligation, prohibition or permission of that act. Such a meaning is an apparent and constant attribute (wasf) deemed by reason to constitute the basis of the Shari'ah rule or command, as it is suitable (munasib) to the purpose of the Lawgiver in instituting that hukm. The purpose of the Lawgiver consists of realizing benefit (maslahah) or preventing harm (mafsadah) or of achieving both goals at the same time.

Munabadha, an aleatory, transaction

Munkar signifies the conduct which is instinctively considered bad by human beings in general.

Murabaha, resale with a stated profit

Murtadd, apostate

Musakat, a contract of lease of agricultural land

Musha, joint ownership

Mustahab, literally, desirable act in the religious practices.

Mustahabb, recommended

Mustamin, an enemy alien who has been given an *aman*

Mut'a, indemnity payable in certain cases of repudiation

Mut'a, temporary marriage

Muta'rif, customary

Muwada'a, understanding temr for a document in connexion with *hiyal*

Muwakkil, the principal (as opposed to the agent)

Muwalat, contract of clientship,

Muzabana, a contract off barter in dates

Muzara'a, temporary share cropping contract

Na'ib, deputy in matters of worship

Nabi, a team for which we have used the word Prophet as an equivalent, refers to a person chosen by God to whom He entrusts the task to warn people against that which would lead to their perdition and to direct them to the way that would lead to their felicity. Prophets are enabled to perform this task because of the special power that is bestowed upon them by God (which is evident from the miracles they are enabled to perform), and because of the special ability to live of absolute probity. The function of a *nabi* is close to, but not necessarily identical with, that of a *rasul*.

Nafaka, maintenance

Nafidh, operative

*Nafy,*banishment

Nahb, robbery

Nasi' was a practice in vogue among the pre-Islamic Arabs: they altered the duration of the four sacred months. Whenever they wished to start fighting or to loot and plunder — and they could not do so during the sacred months — they carried out their expedition in one of the sacred months and then later on compensated for this violation by treating one of the non-sacred months as a sacred month.

nasi’a, delay

naskh, repeal (*nasikh,* the repealing passage; *mansukh,* the repealrd one)

nazar fil-mazalim, ‘investigation of complaints

Nikah al-Muhallil, It is a marriage contract in which a man marries an irrevocably divorced woman with the intention of divorcing her so that she can remarry her previous husband.

Nikah al-Shighaar, This is a form of marriage in which one man gives his female ward in marriage to another man on the condition that the othe man will give his ward in marriage to the first, without there being any dower except the body of the woman in exchange for that of the other. Such a contract is not allowed in the Shari’ah.

nikah, marriage

niyaba, proxy in worship

niyya, intent

nizam, nizam-name, ‘ordinance’, used of modern, secular regulations

Nubuwah means prophethood.

nukul, refusal (to take the oath, &c.)

Qadhf, Falsely accusing someone of sexual misconduct

Qat’i, Definitive. A legal proof is considered as qat’I when it si conclusive and denotes certainty.

Qatt, Certainty, based on conclusive textual or rational evidence.

Qirad, Sleeping partnership. An agreement between two people on the basis of which one of them will supply the funds while the othe will undertake the work, after which whatever profits accrue will be shared by both; however, any loss is to borne by the person who supplied the funds.

Qiyas Kulli, A kind of analogy in which the hold of individual texts and specific cases in released and reasoning proceeds in line with a general principle or set of general principles derived from the Shari’ah texts considered collectively. It is also called qiyasa mursal.

Qiyas, Analogy, syllogism. In Islamic jurisprudence, qiyas or analogical reasoning consists of extending the rule of a specific case (called asl) established by the Shari’ah textual sources to a new case awaiting legal decision on the basis of a sound cause.

Qubool, accepting the offer; giving consent to the offer (ijaab)

Qur’anic terminology it refers to the creature who exceeds the limits of his creatureliness and arrogates to himself godhead and lordship. In the negative scale of values, the first stage of man's error is *fisq* (i.e. disobeying God without necessarily denying that one should obey Him). The second stage is that of kufr, (i.e. rejection of the very idea that one ought to obey God). The last stage is that man not only rebels against God but also imposes his rebellious will on others. All those who reach this stage are taghut.

ra's al-mal, capital

ra'y, 'opinion, individual retractation

rabb al-mal, sleeping partner

Rabb has three meanings: (i) Lond and master; (ii) Sustainer, Provider, Supporter, Nourisher and Guardian; and (iii) Sovereign and Ruler, He who controls and directs everything. God is *Rabb* in all three meanings of the term. The rationale of the basic Qur' anic message – 'serve none but God' – is that since God is man's *Rabb*, He alone should be the object of man's worship and service. See, for example, al-Baqarah 2:21.

Rabb has three meanings: (i) Lord and Master; (ii) Sustainer. Provider. Supporter, Nourisher and Guardian, and (iii) Sovereign and Ruler. He who controls and directs. God is Rabb in all the three meanings of the term. The rationale of the basic Qur'anic message — serve none hut God' — is that since God is man's Rabb — Lord, Sustainer, Provider. Nourisher, etc. — He alone should be the object of man's worship and service. See, for example, Qur'an 2: 21.

rabb, owner

rada, fosterage

Rafidites, or rejectionists, A sect of Shi'ites who approve the practice of defaming the Companions. They were first referred to as Rafidites (Arabic, Rawafid, sing, Rafidah) because they rejected their iman, Zayd ibn Ali when he forbid them to insult Abu Bakr and Umar ibn al-Khattab.

Rahim is from the root r h m which denotes mercy. In the Qur'ãn this attribute of God has been used side by side with RaI.mdn (which is also from the same root r i m). As such Raiim signifies God's mercy and beneficence towards His creatures. Moreover, according to several scholars, the word Ra?2im signifies the dimension of permanence in God's mercy.

Rahmán (literally 'merciful') is one of the personal names of God. According to scholars of the Arabic language and some commentators of the Qur'ãn, the word has the nuance of intensity regarding Divine Mercy. Thus the word does not just signify the One Who has mercy; it rather denotes the One Who is exceedingly merciful; the One Who is overflowing with mercy for all.

rahn, pledge, pawn, security

Rak'ah (p1. rakaat) represents a unit of the Prayer and consists of bending the torso from an upright position followed by two prostrations.

rakaba, substance, also, the person (of a slave)

rakik, slaves

ranazzuh, religious scruple

rashwa, bribery

rasul, messenger

Ribá literally means 'to grow; to increase'. Technically, it denotes the amount that a lender receives from a borrower at a fixed ratcin excess of the principal:

riba, 'excess interest'

rida, consent

Rifadah was the **function** of providing food to the Pilgrims.Like *hijabah* and *siqayah* (q.v.), it was considered an important and honoured function in Makkah on the eve of Islam.

rikaz, treasure

ruju, withdrawal, revocation retraction

Rukba, an archaic form of donation

Rukhsah (plur. Rukhsah), Exemption, silence. It represents the mitigation of a rule by substituting for it a more lenient one, due to some hardship.

Rukn (pl. *arkan*), essential element

Ruku' means to bend the body, to bow. This bowing is one of the acts required in Islamic Prayer. Additionally, the same word denotes a certain unit in the Qur'an. The whole Book, for the sake of the convenience of the reader is divided into thirty parts (ajza', sing. juz'), and each juz' consists usually of sixteen ruka'.

sa'y, si'aya, 129 (q.v. for definition)

Sa'ah literally means "times" or "hour" of day or night. The word has been generally used in the Qur'an with the prefix *al*,signifying the Day of Judgement or the "Hour" about which man has been forewarned.

Sabbath, i.e. Saturday. It was laid down that the Israelites should consecrate that day for rest and worship. They were required to altogether abstain on that day from all worldly acts, including cooking (which they might neither do themselves nor have others do for them).

Sabi, minor

Sadak, nuptial gift

Sadaka, charitable gift

Sadd al-Dhara'i, As a jurisprudential rule, the term sad al-dhara'i means the prohibition of evasive legal means that is blocking the lawful means to an unlawful end.

Sadd al-Dhara'i, The prohibition of evasive legal devices, or of anything which has the potential of leading to that which is forbidden.

Safih, irresponsible

Safka (q.v. for definition)

Sahib al-suk, inspector of the market

Sahih, valid, legally effective

Sahm, fixed share of an heir

Sajdah means prostration. It is one of the prescribed rites of prayer requiring one to put one's forehead down on the floor in humility and out of worshipful reverence for God.

Sakk (pl. *sukuk*), written document

salam, contract for delivery with prepayment

sarf, exchange (of money and precious metals)

sarih, explicit (declaration)

sarika, theft

Sa'y is a rite which is part of both *Hajj* and '*Umrah* consists of seven laps of brisk wall (literally, 'running') between Safa and Marwah, two hillocks near the Ka'bah. This commemorates Abraham's wife Hagar's search for water for her baby child.

sbashi, chief of police in the Ottoman Empire

Sghir, minor

Shadhdh, Irregular statements; statements which are in conflicts with those made by the majority of jurisprudents.

shahada, testimony, evidence of witnesses

shahid (pl. *shuhud*), witness

shar',shari'a, the sacred Law of Islam, I, and *passin;* opposed to *siyasa,* administrative justice

Shari'ah, Way, water spring, watering place, law. In Qur'anic use, the term shari'a denotes the whole of the Divine teachings pertaining to matters of belief and conduct. In the terminology of the jurists, it refers to the body of legal commands instituted by the Qur'an and Prohetic sayings.

Shari'ah signifies the entire Islamic way of life, especially the Law of Islam.

sharik, parthner,

sharika, shirka, society, partnership

sharikat mal, association in property, joint ownership

*shart (*pl. shurut*),* prerequisite, condition

Shaytan (p1. shayatin) literally means refractory, rebellious, and headstrong. Although this word has generally been used in the Qur'an for the satans amongst the jinn, it is also used occasionally for human beings possessing satanic characteristics.

shibh, quasi

shira, purchase

shrub al-khamr, wine-drinking

shubha definition

shufa, pre-emption

shufaja, bill of exchange

Shukr means thankfulness. In Islam, it is a basic religious value. Man owes thanks to God for almost an infinite number of things. He owes thanks to God for all that he possesses — his life as well as all that makes his life pleasant, enjoyable and wholesome. And above all, man owes thanks to God for making available the guidance which can enable him to find his way to his alvation and felicity.

shurta, policy

*shurut (*pl. of *shart),* 'stipulations, legal formularies

shykh al-Islam, the chief *mufti* of a country in the Ottoman Empire

sijill, written judgment of the *kadi*

simar, broker

Siqayah signifies the function of providing water to the Pilgrims during the Pilgrimage season. *Siqayah,* like *hijabah* (q.v.) was an office of great honour.

Siwak, A small stick used for clearing the teeth.

siyasa shariyya siyasa within the limits assigned to it by the *sharia*

siyasa, 'policy', administrative justice

sulh, amicable settlement

sultan, authority, dominion, ruling power

Sunna of Abu Bakr and 'Umar,

Sunna of the Prophet

sunna, precedent, normative legal custom: in pre-Islamic Arabia in early Islam in the ancient schools of law according to shafi, according to Ibn al-Mukaffa according to Ibn Tumart

Sunna, recommended

Sunnah signifies the normative life-pattern of the Prophet (peace be on him) as evident from his sayings, deeds and tacit approvals. In this regard *Sunnah* and *Hadith* (q.v.) are cognate terms, but not quite the same. Stated succinctly, while *Sunnah* represents the Prophet's normative life-pattern, *Hadith* is its record and repository.

Sunnah, way and practice of the holy Prophet (SAWS)

Sunnate ghair mu'akkada, Less emphasized practice of the Prophet (SAWS)

Sunnate mu'akkada, an emphasized practice of the Holy Prophet (SAWS)

Ta'addi, fault, illicit act, tort.

Ta'abbud/ta' abbudi, Devotion or worship. It refers to the commands or rulings in Islamic law for which one can't provide an explanations through human reason, such as the number of rak'ash in prayer.

Ta'abbud/ta'abbudi, Meaning literally, devotion or worship. Those commands or rulings in Islamic Law for which one can't arrive at an explanation through human reason, and for which there is no known basis or occasion. Examples of such rulings include the number of rak'ahs of which the various ritual prayers consist, the prescribed punishments for violations such as sexual misconduct and slander, etc.

ta'lik al-talak, from of conditional repudiation

Ta'lil, Causation, retionalization. The act of indentifying the effective cause or underlying reason (illah) of a Shari'ah command

*ta'rif, (*q.v. for defintion*)*

ta'zir, discretionary punishment awarded by the *kadi*

Tabakat, biographies of lawyers arranged by 'classes' or generations, subject of special works

Tabarru, Donation

Tábi'Un (sing. Tabi'fl, Successors, are those who benefited and derived their knowledge from the Companions of the Prophet (peace be on him). *Tâghut* literally denotes the one who exceeds his legitimate limits. In

Tadbir, manumission which takes effect at the death of the owner

Tafrik dissolution of marriage

*tafwid (*q.v. for definition*)*

Tahajjud is the Prayer offered in the last quarter of the night, at any time before the commencement of the *Fair* Prayer.It is a superogatory rather than an obligatory Prayer, but one which has been emphasised in the Qur'an and in the *Hadith* as meriting great reward from God.

*tahaluf (*q.v.definition*).*

tahalur, conflict of equivalent testimonies

Tahayyul, Manipulation, tricking, use of artifice.

tahdid, threat

tahlil, a device to remove an impediment to marriage

Tahqiq al-Manat, the confirmation of the existence of the illah in the new case (far) to which a rule is to be extended through giyas.

Tahsiniyyat, Embellishments, improvements. In the hierarchical order of the Shari'a objectives the tahsiniyyat come next to the hajiyyat and refer to those aspects of Islamic law the bring comfort and ease in huan life. They are not needed to such an extent that without them the law becomes inoperable or deficient and relinquishing them is not detrimental to the daruriyyat or the hajiyyat. They are meant to improve the general character of the Shari'ah.

tajir, trader, merchant, euphemistic term for the money-lender

takabud, taking possession reciprocally,

Takhrij al-Manat, The mujtahid's derivation of the suitable attribute for the hukm (or illah) is known as takbrij al-manat.

takiyya, simulation

taklid, reference to the Companions of the Prophet (in the ancient schools of law), reliance on the teaching of a master adopting the doctrine of a school of law for a particular transaction

talak, repudiation,

talfik, combining the doctrines of more that one school

tamlik fil-hal, immediate transfer of ownership

tamm, complete

Tanqih al-Manat, Emendation and refinedment of the effective cause (illah) by excluding (ilgha) some of the attributes or states of the act from being the effective cause or ratio legis (illah) of the command.

tapu, an Ottoman fiscal institution of land law

Taqdis has two meanings: (1) to celebrate and proclaim holiness: (2 to purify.

tarika, estate

tasallum, taking delivery

tasarruf, capacity to dispose, disposition

tasbib, bi-sabab, indirect causation

Tasbih has two meanings: (1) to proclaim the glory (of God); (2) to exert earnestly and energetically in the service (of God).

taslim, delivery

Tawaf is a rite which is part of both *Hajj* and *'Umrah* and consists of circumambulating the Ka'bah seven times.

Tawatur Ma'nwi, Thematic recurrence of reports.

Tawatur, or tawatur al-khabar, The report of an event by a group of individuals sufficiently large and disparate that it would be impossible for them to have colluded in falsification.

tawba, repentance

Tawbah basically denotes 'to come back; to turn towards someone'. Tawbah on the part of man signifies that he has given up his disobedience and has returned to submission and obedience to God. The same word used in respect of God means that He has mercifully turned to His repentant servant so that the latter has once more become an object of His compassionate attention.

Tawhid, which is the quintessence of Islam, besides being the doctrial affirmation of God's Oneness and Unity, it also represents man's commitment to render God worship, service and absolute obedience, and to conesecrate them for Him alone.

tawliya, resale at the stated original cost

Tayammum, The principles or fundamentals of Islamic jurisprudence.

thaman, price

1. That man is answerable to God.
   1. That man is answerable to God;
   2. that on a pre-determined day the present order of existence will come to an end;
2. That the present order of existence will some day come to an end.
   3. that the real measure of success or failure of a person is not the extent of his prosperity in the present life, but his success in the Next.
3. That the real measure of success or failure of a person is not the extent of his prosperity in the present life, but his success in the Next.
   4. that thereafter God will bring another order into being in which He will resurrect all human beings, gather them together and examine their conduct,and rewarded them with justice and mercy;
   5. that those who are reckoned good will be rewarded whereas the evil-does will be punished; and
4. That those who are reckoned good will be sent to Paradise whereas the evil-doers will be consigned to Hell.
5. That when that happens, God will bring another order into being in

which He will resurrect all human beings, gather them together and examine their conduct, and reward them with justice and mercy.

Thawab denotes recompense and reward. A major thrust of Islamic teachings is that man should be concerned with the ultimate recompense that he will receive for his deeds. Some of these good or bad deeds might be recompensed in some measure in the present world. However, what is of basic importance is the Next World where the righteous will enjoy lasting bliss and the wicked will suffer lasting punishment.

thika, a trustworthy person

tift, small child, babe-in-arms

udul (pl.of *'adl,* q.v.*),* professional witnesses notaries

uhda, a guarantee against specific faults in a slaveor an animal particular to the Maliki school

ujra, hire rent

ukr, (for definition)

ukuba, a Maliki punishment in certain, cases of homicide

ulama, the religious scholar of Islam

umm walad, female slave who has borne a chil to her owner

Ummi means 'unlettred'.It is also used to refer to those who do not possess Divine revelation.

umra, donation for life

urf, custom

usul (sing. Asl) or *usul al-fikh* the roots or theoretical bases of Islamic law

Usul al-Fiqh, The principles or fundamentals of Islamic jurisprudence.

wadi'a deposit

wadia, resale with a rebate

Wahy Literally, revealing some thing secretly to any one else, in the terminology of the shariah it is Allah's communicating His word to His chosen men, called *Nabi,* and *Rasul,* or angles. The nature of this communication is of its own kind. Being a unique experience of the chosen men's communion with the world of the unseen, no human language can afford to explain the concept of *wahy,* or make it fully comprehensible. Only simplification is possible and that is what has been sought by a number of the hadiths of the Holy Apostle of Allah.

wajib (i) Obligatory (2) definite binding, due

Wajib, obligatory command of the Shariat but next to the farz.

wakala, procuration

wakf pious foundation, mortmain

wakil, deputy, agent, proxy, attorney

wala, the relationship of client and patron

wali al-dam, the next of kin who has the right to demand retaliation

wali, legal guardian

wara, religious scruple

warith, heir

wasf, the circumstances of a transaction

wasi, executor and/or guardian appointed by testament

wasiyya (pl. *wasaya*) legacy

wathika, (pl *watha'ik*), written document
Wazf, Trust, endowment
Wazi, Restraining force.
wilaya, competence, jurisdiction

Wudu' refers to the ablution performed for acquiring the state of ritual purity which is a pre-requisite to perform Prayers. It reqires washing (1) the face from the top of the forehead to the chin and as far as each ear; (2) the hands and arms up to the elbows; (3) wiping with wet hands a part of the head; and (4) washing the feet to the ankles.

wukuf, abeyance, jurisdiction
yad, possession (also in a wider meaning)
yamin, oath (understaking)
zahir, the literal meaning (of Koran and tradition), the outward state

Zakah literally means purification, whence it is used to denote a portion of property bestowed in alms, which is a means of purifying the person who dispenses it and his property. It is among the five pillars of Islam and refers to the mandatory amount that a Muslim is required to pay in alms out of his property. The detailed rules of *zakah* laid down in books of *Figh*.

zakat, alms-tax
zawj, husbad, *zawja*, wife
zihar, (for definition)

Zina means illegal sexual intercourse and embraces both fornication and adultery.

zina, unchasity (unlawful intercourse)

Zuhr Prayer is one of the five obligatory Prayers which is performed after the sun has passed the meridian. It may be performed until the time for the beginning of 'Asr Prayer.

Zulm literally means placing a thing where it does not belong. Technically, it refers to exceeding the limits of right and hence committing wrong or injustice. Zulm, however, does not signify any one specific act; rather it embraces all acts that are inconsistent with righteousness and justice and to which, in one sense or other, the attribute of 'wrong-doing' can rightly be applied.

For the preparation of the glossary the editor has mainly drawn up on the following three sources :

Sano Qutb Mustafa, Mujam Mustalahat Usul-al-Fiqh, Arabic Inkhizi, Syria, Damascus : Darul-Fikr, 2000.

Muhammad Rawwas Qalanji et al., Mujam Lughat al Fuqaha, English-French-Arabic (Beirut, Dar al-Nafais, 1996).

Lane, Edward William, Arabic-English Lexicon Islamic Book Centre 1978.

Md. Ibrahim Khan

SELECT BIOGRAPHICAL NOTES

- ʻA'ishah, d. 58 A.H. /678 C.E., daughter of Abu Bakr, was a wife of the Prophet (pace be on him). She has transmitted a wealth of Traditions, especially those concerning the Prophet's personal life. She was also regarded highly for her mature and sharp understanding of the teachings of Islam.
- 'Abd Allah ibn 'Abbas, d. 68 A.H. /687 C.E., a Companion of the Prophet (peace be on him). Was the most outstanding scholar of Qur'anic exegesis in his time.
- 'Abd Allah ibn 'Amr ibn al-As, d. 65 A.H. /684 C.H., was a Companion and son of the conqueror of Egypt who embraced Islam before his father. He was noted for his devotion and learning and prepared one of the first collections of *Hadith.*
- 'Abd Allah ibn Jaubayr, d. 3 A.H. /625 C.E., a Companion of the Prophet (pace be on him), participated in the battles of Badr and Uhud. In the latter battle, in which he was martyred, he was the commander of the archers.
- 'Abd Allah ibn Mas'ud, d. 32 A.H. /653 C.E., one of the most learned Companions of the Prophet (Peace be on him), was noted especially for his juristic caliber. He was held by the Iraqi school of law as one of its main authorities.
- 'Abd Allah ibn Ubayy ibn Salul, d. 9 A.H. /630 C.E., was the foremost enemy of the Prophet (peace is on him) and the ringleader of the hypocrites in Madina.
- 'Abd Allah ibn Umar, d. 73 A.H. /692 C.E., a famous Companion and son of the second Caliph. Was famous for his piety and for transmitting many traditions from the Prophet (peace is on him).
- 'Abud al-Din 'Abd al-Rahman al-Iji was born in 700/130 in the small town of Ij nearby Shiraz and died during his imprisonment in its military fortress in 756/1355. He was an outstanding legal theorist, linguist and Ash'ari theologian. After Fakhr al-Din al-Razi, Ash'arite theology is continued chiefly in a series of manuals eclectically dependent upon the great writers of the past. The most famous of these, al-Iji's al-Mawaqif fi Usul al-Din, has continued to serve as a textbook on theology to the present day. Among the various commentaries written on it, the most important and widely used is that of al-Shairf 'Ali ibn Muhammad al-Jurjani (d.816/1413), and together with this text the Mawaqif has gone through a large number of printed editions since the early nineteenth century. Besides the Mawaqif his works

include al-‘Aqa’id al-‘Adudiyyah, Sharh al-Mukhtasar (in usul al-fiqh) and a commentary on the Qur’an.

- ‘Ali ibn abi Talib. D. 40 A.H. /661 C.E., was a cousin and also son-in-low of the Prophet (peace be on him) and the fourth Caliph of Islam. He was known for his many qualities, especially piety and juristic acumen.
- ‘Umar ibn ‘Abd al-‘Aziz, d. 101 A.H. /720 C.E., was an outstandingly pious and just Caliph of the Umayyad dynasty who was also famous for his knowledge and learning.
- ‘Umar ibn al-Khattab, d. 23 A.H. /644 C.E., was the second Caliph of Islam under whose Caliphate the Islamic state became increasingly organized and its frontiers vastly expanded.
- ‘Uqbah ibn ‘Amir, d. 58 A.H. /678 C.E., was a Companion of the Prophet (Peace be on him) who later became government of Egypt.
- ‘Uqbah ibn abi Mu‘ayt, d. 2. A.H. /624 C.E., was one of the most inveterate enemies of Islam who were responsible for the cruel persecution of Muslims in Makka.
- ‘Uthman ibn ‘Affan, d. 35 A.H. /656 C.E., was a son-in-law of the Prophet (peace be on him) and the third Caliph of Islam under whose reign vast areas were conquered and the Qur’an present codex was prepared.
- 'A' ishah, d. 58 A.H./678 C.E., daughter of Abu Bakr, was a wife of the Prophet (peace be on him). She has transmitted a wealth of traditions, especially those concerning the Prophet's personal life. She was also regatded very highly for her mature and sharp understanding of the teachings of Islam.
- 'Abd Allah ibn 'Abbas, d.68 A.H./687 C.E., a Companion of the Prophet (peace be on him), was the most outstanding scholar of Qur'anic exegesis in his time.
- 'Abd Allah ibn al-Mubarak, d. 181 A.H./797 C.E., was a noted scholar of *Hadith*,*Figh* and Arabic language.
- 'Abd Allah ibn-Mubarak, d. 32 A.H./653 C.E., one of the most learned Companions of the Prophet (peace be on him), was celebrated for his juristic calibre. He is held by the Iraqi school of law as one of its main authorities.
- 'Abd al-Muttalib ibn Hashim ibn Abd Manaf, d.45 B.H./579 C.E., the Prophet's grandfather, was a prominet chieftain of the Quraysh who was responsible for provision of water and food (*siqayah* and *rifadah*) to the pilgrims.
- 'Abd al-Razzaq al-San 'ani, d. 221 A.H./827 C.E., was a distinguished scholar of *Hadith*.His most outstanding work is *al-Musannaf*.

- Abraham (Ibrahim) was one of the greatest Prophets of all times and the ancestor of a large number of the greatest Prohets including the Prophets Moses, Jesus and Muhammad (peace be on all of them). Abraham was born and lived his early life in Iraq but later embarked on a sojourn in God's cause: from his homeland in Ur he travelled all the way northwards to Harran and then southwards to Jerusalem, journeying in between to Makkah where he erected the Sacred House for God's worship as to Egypt. He went about preaching that God be held as one and unique and worship and service be consecrated to Him alone. Three of the foremost religions of the world, Judaism, Christianity and Islam, revere Abraham as their Patriarch and a major source of inspiration.
- Abu al-‘Ala’ Ahmad ibn ‘Abd Allah ibn Sulayman al-Tannukhi al-Ma‘arri (363/973-449/1057) was born in a small town know as Ma’arrat al-Nu’man in Syria. He was a great poet and man of letters. Amongst his poetic work are: al-Luzumiyyat and Saqt al-Zand. His prose work consists mainly of Risalat al-Ghufron, which is an imaginative journey in the Hereafter. Al-Ma’arri used to call himself the prisoner of the two prisons (rabin al-mahbisayn): one was natural, consisting of his loss of sight, and the other was social, consisting of his seclusion in his house and isolation from people.
- Abu al-Darada. Uwaymir ibn Malik, d. 32 A.H. /652 C.E., was a distinguished Companion who contributed to the collection of the Qur’an, and was known for his bravery as well as his piety and religious devotion.
- Abu al-Darda', 'Uwaymir ibn Malik, d. 32 A.H./652 C.E., was a famous Companion who contributed significantly to the collection of the Qur'an on the heels of the Prophet's demise. Apart from knowledge, he was also known for his bravery, piety and religious devotion.
- Abu Bakr, ‘Abd Allah ibn ‘Uthman, d. 13 A.H. /634 C.E. was the most trusted Companion of the Prophet (peace be on him) and the first Caliph of Islam. Abu Bakr’s wisdom and indomitable will ensured the survival of Islam after the death of the Prophet.
- Abu Bakr, 'Abd Allah ibn 'Uthman, d. 13 A.H./634C.E., was the most trusted Compantion of the Prophet (peace be on him) and first Caliph of Islam. Abu Bakr's wisdom and indomitable will ensured the survival of Islam after the Prophet's demise.
- Abu Daud Sulayman ibn al-Ash’ath, d. 275 A.H. /889 C.H. was famous traditions whose Kitab al-Sunan is one of the six most authentic collections of *Hadith.*

- Abu Dawud Sulayman ibn al-Ash'ath, d.275 A.H./889 C.E., was a famous traditionist whose *kitam al-Suman* is one of the six most authentic collections of *Hadith*.
- Abu Hanifah, al-Nu 'man ibn Thabit, d.150 A.H./675 C.E., was a theologian and jurist who dominated the intellectual life of Iraq in the latter part of his life and became the founder of a major school of law in Islam known after his name.
- Abu Hurayah, d. 59 A.H./ 679 C.E., was a Companion of the Prophet (peace be on him) who transmitted a very large number of traditions.
- Abu Hurayrah, d. 59 A.H. /679 C.E., was a Companion of the Prophet (peace be on him) who transmitted a verry large number of Traditions.
- Abu I ahab, 'Abd al-'Uzza ibn 'Abd al-Muttalib ibn Hashim, d.2 A.H./624 C.E., was an uncle of the Prophet (peace be on him). He was, however, one of Islam's fiercest enemies.
- Abu Jahl, ʻAmr ibn Hisham ibn al-Mughirah, d. 2 A.H. /624 C.E. was an arch-enemy of Islam throughout his life. He was killed during the Battle of Badr in which he was the leading commander on the side of the Quraysh.
- Abu Jahl, 'Amr ibn Hisham ibn al-Mughirah, d. 2A.H./624 C.E., was an arch-enemy of Islam who was killed during the Battle of Badr in which he was the leading commander on the side of the Quraysh.
- Abu Lahab, ʻAbd al-Uzza ibn ʻAbd al-Muttalib ibn Hashim, d. 2 A.H. /624 C.E., was am uncle of the Prophet (peace be on him). He was, hower, one of the fiercest enemies of Islam and the Prophet.
- Abu Muhammad ʻAbd Allah ibn Abi Zayd al-Qyrawani was born in 310 AH and died in 368 AH. He lived in the old Islamic city of Qayrawan (Kairouan), the capital of the Aghlabid dynasty (184/800-296/908) and the seat of Islamic learning in North Africa for many centuries. He was an authority on many branches of Islamic scholarship such as Qur'an exegesis, fiqh and usul al-fiqh, and ilm al-kalam. His authority on Maliki jurisprudence was such that he was recognized as Malik junior (Malik al-Saghir). Biographers attribute to him over twenty-Five books in different disciplines.
- Abu Musa al-Ash'ari, ʻAbd Allah ibn Qays, d. 44 A.H. /665 C.E. was a Companion of the Prophet (peace be on him) who embraced Islam is its early years and migrated with other Muslims to Abyssinia. He was latter appointed by the Prophet (peace be on him) as governor over Zabid and ʻAdab (Aden); still later he was appointed as governor of Basrah, and subsequently of Kufah. He also served as an arbitrator in the dispute between ʻAli and Mu ʻawiyah.

- Abu Said al-Khudri, Abu Sa id Sa‘d ibn Malik ibn Sinan al-Khudri al-Kharaji al-Ansari. He was born 10 years before the Hijrah in 74 AH. He narrated many of the Prophet’s Traditions as well as statements and opinions of the four caliphs and other Companions as well as statements and opinions of the most knowledgeable and intelligent Companions in relation to the juristic interpretation and understanding of the Shari‘ah sources. A number of the Prophet’s Companions, such as ‘Abd Allah ibn ‘Abbas (the Prophet’s cousin), ‘Adb Allah ibn ‘Umar ibn al-Khattab, Jabir ibn ‘Abd Allah and Abu Umamah, narrated from him Owing to his youth, the Prophet did not allow him to participate in the Battle of Uhud, in which his father was killed
- Abu Sufyan, Sakhr ibn Harb ibn Umayyah, d. 31 A.H. /652 C.E., was one of the foremost opponents of Islam and the Prophet (peace be on him) until the conquest of Makka, when he embraced Islam. In subsequent military encounters, Abu Sufyan fought on the Muslim side.
- Abu Sufyan, Sakhr ibn Harb ibn Umayyah, d.31 A.H./652 C.E., was one of the foremost opponents of Islam and Prophet (peace be on him) till the conquest of Makkah, when he embraced Islam. In subsequent military encounts, he valiantly fought on the Muslim side.
- Abu Talhah, Zayd ibn Sahl ibn al-Aswad, d. 34 A.H. /654 C.E., was a Companion noted for his courage and for his skill as an archer. He participated in the battles of Badr, Uhud, Khandaq, and in several military expditions.
- Abu Yasir (ibn Akhtab), d. 5 A.H. /627 C.E., was a prominent Jewish leader in the time of the Prophet (Peace be on him). He was the brother of Huyayy ibn Akhtab, and was as inveterate an enemy of Islam as his elder brother.
- Abu Yusuf, Ya 'qub ibn Ibrahim, d. 182 A.H./798 C.E.,an outstanding jurist, was one of the most prominent disciples of Abu Hanifah and is considered among the founders of the Hanafi school of law.
- 'Ad, the people among whom God raised Hud, lived in al-Ahqaf in the Southern part of Arabia, not far from Hadramawt. 'Ad denied God's Messengers, charging them with falsehood, and brutally oppressed others. 'Ad were totally annihilated by God for their inquity.
- Ahmad ibn Hanbal, d.241 A.H. /855 C.E., was the founder of one of the four Sunni schools of law in Islam. He valiantly suffered persecution for the sake of his religious conviction.
- Ahmad ibn Hanbal, d.243 A.H./885 C.E., was the founder of one of the four Sunni schools of law in Islam. He patienty endured persecution for the sake of his religious convictions.

- Al- Waqide, Muhammad ibn ‘Umar, d. 207 A.H. /823 C.E., was one of the earliest and most famous Muslim historians, who was known especially for his Maghazi, a biography of the Prophet (peace be on him).
- Al-Alusi, Mahmud ibn ‘Abd Allah al-Husayni, d. 1270 A.H. /1854 C.E., was a leading commentator of the Qur’an litterateur, jurist and Sufi of the nineteenth century. His commentary Ruh al-Ma’ani is an encyclopedic work which continues to command considerable respect.
- Al-Alusi, Mahmud ibn 'Abd Allah al-Husayni, d. 1270 A.H./1854 C.E., was a leading commentator of the Qur 'an as a distinguished litteraterur, jurist and Sufi of the nineteenth century. His commentary, *Ruh al-'ani*, is an encyclopaedic work which contibues to command respect.
- Al-A'mash, Sulayman ibn Mahran, d. 148 A.H./765 C.E., was a Successor (*Tabi'i*) who distinguished himself for his knowledge of the Qur'an and *Hadith* and his mastery of the laws of inheritance.
- Al-'As ibn Wa'il al-Sahmi, d. 1 A.H./622 C.E., was a fierce enemy of the Prophet (peace be on him) who expressed his hostility to him in the most bitter terms. He died at the age of 85 as a result of an accident.
- Al-Ash’ari, His real name was ‘Abd Allah ibn Qays, but he was, and continues to be known as Abu Musa al-Ash ari. He left his native land, the Yemen, for Makkah immediately after hearing that a Prophet had appeared there. At Makkah, he stayed in the company of the Prophet from whom he gained knowledge and guidance. He returned to his country to propagate the Word of god and spread the mission of His Apostle. We have no further news of him for more than decade. Thin, just after the end of the Khaybar expedition he came to the Prophet in Madianah. His arrival there coincided with that of Ja‘far ibn Abi Talib other Muslims from the Yemen, all of whom had accepted Islam. Abu Musa al-Ash ari was of outstanding qualities that manifested themselves brilliantly in the service of Islam, both during the Prophet’s time and afterwards. He excelled as faqih, military commander and judge.
- Al-A'sha, Maymun ibn Qays, d.7 A.H. / 629 C.E., was among the foremost poets of Arabic.
- Al-Bahili,Abu Umamah Sada ibn 'Ajlan ibn Wahb (d. 81 A.H./701 C.E.), was a Companion who supported 'Ali in the Battle of Siffin. He lived in Syria and died in Hims. He was the last Compantion who died in Syria.
- Al-Bara ibn Azib, d. 71 A.H. /690 C.E., was a Companion who embraced Islam at a tender age, participated in several military expeditions and played significant roles in them.

- Al-Bara' ibn 'Azib,d. 71 A.H./690 C.E., was a Compantion who embraced Islam at a tender age, participated in several military expeditions and played significant roles in them.
- Al-Bayhaqi, Ahmad ibn al-Husayn, d. 458 A.H./1066 C.E., was an authority on *Hadith*.He left a vast treasure of scholarly works of which the follwing deserse special mention: *al-Sunan al-Sughra,Dala'il al-Nubuwah* and *Manaqib al-Imam al-Shafi'i.*
- Al-Bukhari, Muhammad in Ismail, d. 256 A.H. /870 C.E., is regarded as the most famous traditions of Islam, whose work is one of the six most authentic collections of Hadith, generally considered by Muslims to be the ‘soundest book after the Book of Allah.
- Al-Bukhari, Muhammand ibn Isma'il, d. 256, A.H./870 C.E., is regarded as the most famous traditionist of Islam whose work is one of the six most authetic collections of *Hadith*,generally considered by Muslims to be the "soundest book after the book of Allah".
- Al-Darimi, ‘Abd Allah ibn ‘Abd al-Rahman, d. 255 A.H. /869 C.E., was one of the outstanding scholars of Hadith whose Musnad is highly regarded.
- Al-Hasan al-Basri, d. 110 A.H. /728 C.E., known primarily for his primarily for his piety, was a major theologian of Basrah during the last decades of the first century of Hijrah/seven centry C.E.
- Al-Hasan al-Basri, d. 110 A.H./728 C.E., known priarily for his piety, was a major theologian of Basrah around the turn of the first century of *Hijrah*.
- 'Ali ibn Abi Talib, d.40 A.H./661 C.E., was a cousin and son-in-law of the Prophet (peace be on him) and the fourth Caliph of Islam. He was known for his many qualities, especially piety and juristic acumen.
- Al-Jassas, Ahmad ibn ‘Ali, d. 370 A.H. /980. C.E., was an eminent jurist of the Hanafi school of law in his time. He is celebrated for his qur’an-Commentary, Ahkam al-Qur’an, which is an erudite commentary on the Qur’an from a legal perspective.
- Al-Jassas, Ahmad ibn 'Ali, d. 370 A.H./980 C.E., was an eminent jurist of the Hanafi school of law. He is celebrated for his Qur'an-commentary, *Ahkam al-Qur'an,*which is an erudite commentary on the Qur'an from a legal perspective.
- Al-Juwaini, Imran al-Haramain Abu al Ma ali Abd al-Malik ibn Abi Muhammad ‘Abd Allah ibn Yusuf al-Juwayani, known as Imam al-Haramayn, was born in 419/1028 in small village called Juwayan near Nishapur in northern Iran. A great Shafi Jurist and Ashari theologian, al-Juwayani had a lasting impact on the development of ususal al-fiqh (Islamic legal theory) and Ash’ ari kalam (theology). He was a close collaborator with

the strong Seljuk Prime Minister Nizam al- Mulk, who appointed him Professor of Shafi'ite jurisprudence at the Nizamiyyah School established by him in Baghdad. Al-Juwayni left many outstanding works that remained unchallenged sources for the subsequent generations of students of Islamic theology and legal theory. They include, among others, al-Shamil fi usual al-Din, Kitab al-Irshad ila Qawari al Adillah fi al tiqad 9in theology) Kitab al-Talkhis fi Usul al-Fiqh, al Burhan fi Usul al-Juwayni (in legal theory). He died in 478/1085.

- Al-Mazari, His full name is Abu 'Abd Allah Muhammad ibn 'Ali ibn 'Umar ibn Muhammad al-Tamimi al-Mazari. He was born in the city of Mazarah in Sicily in 453 AH. Most probably, he migrated to Tunisia in 464 AH after the island had completely fallen under the control of Normas. In Tunisia, he studied with some of the most authoritative Maliki scholars of his time, especially Aby al-Hasan 'Alo ibn Muhammad al-Rabi al-Lakhmi (d. 478 AH) and Abu Muhammad 'Abd al-Hamid Ibn al-Saigh (d.486 AH). Like most great scholars in the Islamic tradition, al-Mazari studied, besides tafsir, hadith, fiqh and usul al-fiqh, theology and philosophy as wellas methamatics and medicine. Tis endowed him with breadth of vision and analytic mind in dealing with juristic issues.
- Al-Mughirah ibn Shu'bah al-Thaqafi, d. 50 A.H./670 C.E., was a Companion. He was highly intelligent and tactful, as a good miltary commander who was also entrusted with the governoship of Basrah and then of Kufah.
- Al-Nadr ibn Harith, d. 2 A.H. /624 C.E., was among the staunchest enemies of Islam who personally caused the Prophet (peace be on him) much annoyance. Standard-bearer of the Quraysh in the Battle of Badr, he was taken prisoner and put to death.
- Al-Nadr ibn Harith, d. 2 A.H./624 C.E., was among the staunchest enemies of Islam who personally caused the Prophet (peace be on him) much annoyance. He was the standard-bearer of the Quraysh in the Battle of Badr, during the course of which he was taken captive and put to death.
- Al-Nasai, Ahmad ibn, Ali d. 303 A.H./915 C.E. was one of the foremost scholars of *Hadith* whose *Kitab al-Sunan* is considered one of the six most authentic collections of Traditions.
- Al-Nisaburi, al-Nizam, d. circa 850 A.H. /1446 C.E. was one of the foremost scholars who richly contributed to Quranic studies, especially by his *tafsir* called *Ghara ib al-Quran was Ragha ib al-Furqan.*
- Al-Qadi Abu Muhammad Abu al-Haqq ibn Ghalib Abu al-Rahman Ibn Atyah was born in Gharnatah (Granada) in 481 AH and died in lurgah

(Lorca) in 542/1148. He was an eminent Qur'an commentator and renowned jurist with a sound knowledge of the Traditions (Hadith).- Author.

- Al-Qalqashandi, Ahmad ibn, 'Ali ibn Ahmad al-Fazari, d.821 A.H. /1418 C.E., was a historian, a literature and reasearcher. He was born in Egypt in a family of scholars. His most celebrated wok is *Subh al-A sha* in 14 volumes.
- Al-Qarafi, Shihab al-Din Ahmad ibn Idris al-Qarafi al-Sanhaji. Born in 626/1229 in the small village of Qarafah near Cairo, al-Qarafi studied with most outstanding scholars of his time, especially Izz al-Din 'Abd al-Salam. He was the most authoritative Maliki jurit of his time in Egypt. Al-Qarafi was an energetic and prolific writer, whose writings covered many disciplines, such as theology, jurisprudence, anti-Christian polemics, Arabic language sciences, Qur'anic interpretation, etc. His voluminous book al-Dhakhirah is a major source of Maliki juristic doctrines, in which he applied a comparative approach. His book al-Furuq is a pioneering work in codifying the juristic rules and maxims. In addition, he wrote many books on usul al-Fiqh, such as Tanqib al-Fusul, Nafa'is al-Usul fi Sharb al-Mohsul. He died in 684/1285.
- Al-Qaysi, Abu Muhammad Makki ibn Abi Talib al-Qaysi was born in the historic Islamic city of a-Qayrawan (Kairouan) in 355/966 at a time when it was being destabilized by the attacks of the apostate Berber tribes and the ascending Ubaydi (Fatimid) forces. He traveled many times to Egypt, the Hijaz (Makkah and Madinah), and Syria in pursuit of knowledge.
- Al-Qurtubi, Muhammad ibn Ahmad, d. 671 A.H. /1273 C.E., was one of the most distinguished commentators of the Qur'an. His al-Jami li Ahkam al-Qur'an but also one of the best tafsir works.
- Al-Qurtubi, Muhammad Ibn Ahmad, d. 671 A.H./1273 C.E., was one of the most distinguished commentators of the Qur'an. His *al-Jami li-Ahakm al-Quran* is not only one of the best commentaries of the legal verses of the Quran but also one of the best works of *tafsir.*
- Al-Razi, Abu 'Abu Allah Muhammad ibn 'Umar ibn al-Husayn Fakhr al-Din al-Razi was bron in Rayy in 544/1149. He was known by various titles testifying to the high status he attained during his life, such as Abu al-Fadl, Abu al-Ma 'ali, Ibn al-Khatib, al-Imam, etc. His father, Diya' al-Din, was himself and outstanding scholar of his time. Fakhr al-Din was brought up in the Shafi'ite School of jurisprudence and belonged the Ash'arite School of kalam-philosophy. Following the tradition of classical Islamic scholarship, al-Razi spent many years traveling to various parts of the Muslim world in search of knowledge. During his journeys, he engaged in intellectual debates with representatives of opposing schools, especially the Mu'tazilites. His

scholarship was indeed encyclopedic, as proved by the diversity and extensiveness of his extant works covering most of the traditional Islamic disciplines.

- Al-Razi, Muhammad ibn 'Umar Fakhr al-Dinm d. 606 A.H./1210 C.E., was one of the most famous exegetes of the Qur'an and the most outstanding scholar of his time who was well-versed in both religious and rational sciences.
- Al-Shafi I, Muhammad ibn Idris, d. 204 A.H./820 C.E., was the founder of one of the four Sunni schools of law in Islam. He had a deep and abiding impact of the intellectual outlook of Muslims.
- Al-Shafi'I, Muhammad ibn Idris, d. 204 A.H. /820 C.E., was the founder of one of the four Sunni schools of law in Islam.
- Al-Shatibi, Abu Ishaq Ibrahim ibn Musa ibn Muhammad al-Lakhmi al-Shatibi grew up in Granada (or Gharnatah in Muslim Spain or al-Andalus) and acquired his entire training in this city, which was the capital of the Nasri kingdom. In his youth, al-Shatibi witnessed the reign of Sultan Muhammad V al-Ghani Bi'llah, which was a very was very eventful period in the history of Granada. During al-Shatibi's life, Granada became a centre of attraction for scholars from all parts of North Africa, such as the eminent Ibn Khaldu. This gave his the chance to study with the most outstanding scholars of his time, especially those with a clearly reflected in his special interest in the study of usul al-fiqh resuling in his magnum ops al-fiqh resuling in his magnum opus al-Muwafaqat, whose main focus is the methodology and philosophy of Islamic Law, in particular, the higher objective of the Shari'ah, (maqasid al-Shari'ah). In addition to this book, he left another important work entitled Kitab al-I'tisam. Al-Shatibi died on 8 Sha'ban 790/1388.
- Al-Shawkani, Muhammad ibn Ali, d. 1250 A.H./1834 C.E. was a distinguish Islamic scholar of Yemen. He contribueted richly to almost all branches of Islamic learning –*Tafsir, Hadith, Fiqh, Usul al-Fiqh,* History etc.
- Al-Suddin, Ismail ibn Abdal-Rahman, d.128 A.H./745 C.E. was one of the early scholars of *Tafsir* who has written a significant work in that field.
- Al-Suhayli, Abd al-Rahman ibn , Abd Allah ibn Ahmad, d. 581 A.H. / 1185 C.E., was scholar of Arabic language and *Sirah*. He is especially known for his commentary on ibn Hisham's *Sirah* called *al-Rad al-Unuf.*
- Al-Suyuti, Jalal al-Din, d. 911 A.H. 1505 C.E., was an eminent historian, *muhaddith* and linguist besides being an eminent scholar and exeget of the Quran. He was a prolific writer who has about 600 works to his credit.

- Al-Tabarani, Sulayman ibn Ahmad ibn Ayyub, d. 360 A.H. 971 C.E., specialized in *Haidth*. His works also cover the fields of *Tafsir* and theology.
- Al-Tabari, Muhamma ibn Jarir, d. 310 A.H./923 C.E., was distinguished historian, jurists and Quran commentator. His extant works include his commentary *Jami al-Bayan fi Tafsir al-Quran* and his *Tarikh al-Rsul wa al-Muluk.*
- Al-Tabari, Muhammad ibn Jarir, d. 310 A.H. /923 C.E., was a distinguished historian, jurist and Qur'an-Commentator. His major extant works include his commentary Jami 'al-Bayan fi Tafsir al-Qur'an and his Annals, viz. Ta'rikh al-Rasul wa al-Muluk.
- Al-Thawri, Sufyan ibn Said ibn Masruq, d. 161 A.H./778 C.E., was considered an authority in different branches of Islamic learning especially *Hadith*. His works include *al-Jami al-Kabir* and *al-Jami, al-Saghir,* both of which are works of *Hadith*.
- Al-Tirmidhi, Muhammad ibn 'Isa, d. 279 A.H. /892 C.H., was a famous traditions whose collection of Traditions, Kitab al-Sunan, is considered one of the six most authentic collection of Hadith.
- Al-Tirmidhi, Muhammad ibn Isa, d. 279 A.H./892 C.E., was a famous traditionist whose collection of traditions, *Kitab al-Sunan,* is considered one of the six most authentic collections of *Hadith*.
- Al-Wahidi Ali ibn Ahmad, d. 468 A.H./ 1076 C.E., contributed ti *Tafsirm Fiqh, Maghazi* (a branch of *Sirah*) as well as Grammar and Philology.
- Al-Walid ibn al-Mughirah, d. 1 A.H. / 622 C.E., was chieftain of the Makhzum clan of the Quraysh who was highly regarded for his ability as an arbitrator. At the time of Islam's advent Walid, already an old man, responded to it with fierce enmity. He brought together the Quraysh and elibrated with them regarding what should be the main point of their propaganda campaign against the Prophet (peace be on him). Walid's own view was that they should brand him a magician.
- Al-Zamakhshari, Abu al-Qasmi Mahmud ibn 'Umar al-Zamakhshari (467/1070-539/1144) was a Persian-born Muslim scholar, whose exegetic work al-Kashaf, the Discoverer of Truth stand out as one of the major works of tafsir bi al-ra'y. Based on the Mu'tazilite rationalist approach and considered to be the standard work of Mutazilite tafsir, Zamakhsari's writings place much emphasis on Arabic grammar and lexicography as a means of interpretation with less attention given to transmitted reports and traditions. This exegetic work has been the subject of many commentaries and glossaries by eminent scholars, who were mostly Ash'arites.

- Al-Zuhri, Muhammad ibn Muslim ibn Shihab al-Zuhri died in 124 AH. Ibn Shehab al-Zuhri received his first education from sa'id ibn al-Musayyib, who taught him for eight years. He was also taught by 'Ubayd Allah ibn 'Abd Allah ibn 'Utbah, who was one of the seven leading jurists of the time. Ibn Shihab al-Zuhri was the son of Muslim ibn Shihab, who supported 'Abd Allah ibn al-Zubayr, who fought against the Umayyads for many years. Al-Zuhri is one of the greatest authorities on Hadith.
- Al-Zuhri, Muhammad ibn Muslim ibn Shihab, d. 124 A.H. /721 C.E., was an outstanding early second Islamic century/eighth century C.E. scholar of Madina who left and indelible impression of Hadith and Sirah.
- Among his works were the following: Mafatih al-Ghayb (Qur'anic exegesis), al-Mahsul fi 'Ilm al-Usul (Islamic legal theory or usul al-Fiqh), al-Matalib al-Aliyyah mina al-'Ilm al-Ilahi and al-Mabahith al-Mashriqiyyah (theology and philosophy). One outstanding feature of al-Razi's intellectual legacy was an attempt to synthesize Ash'arite and Mu'tazilite doctrines as well as theology and philosophy. Al-Razi died in Heart in 606/1209. For more on his life and works see, Yasin Ceyan, Theology and Theology and Tafsir in the Major works of Fakhr al-Din al-Razi (Kuala Lumpur: International Institute of Islamic Thought and Civilization [ISTAC], 1996); and Roger Arnaldez, Fakhr al-Din al-Razi: Commentator du Coran et philosophe (Paris: Librairie PhilosoPhique J. Vrin, 2002.)
- 'Amr ibn al- 'As ibn Wa'il, d. 43 A.H. /664 C.E., was a noted Companion of the Prophet (peace be on him) who commanded the Muslim army that conquered Egypt. He also commanded the Muslim army in many battles during the lifetime of the Prophet (peace be on him) and the Caliphates of Abu Bakr and 'Umar ibn al-Khattab.
- Anas ibn Malik, d. 93 A.H. /712 C.E., was a distinguished Companion who had the honour of serving the Prophet (peace be on him) for many years.
- Anas ibn Malik, d.93A.H./712 C.E., was a distinguished Companion who had the honour of serving the Prophet (peace be on him) for many years.
- Ata ibn abi Rabah, d. 93 A.H. /732 C.E., a prominent Tabi'l (Successor) of Makka, was a famous jurist.
- 'Awn ibn 'Abd Allah, d. circa 115 A.H./733 C.E., was an orator, a poet as well as a narrator of poetry and a specialist in genealogy. He lived in Kufah and was respected for his devotion and piety.
- Bilal ibn Rabah, d. 20 A.H. /641 C.E., was very famous Companion of the Prophet (peace be on him) and mu'adhdhin (caller to Prayer).
- Bishr ibn al-Bara ibn Ma'rur, d. 7 A.H. /729 C.E., was a Companion of the Prophet (Peace be on him) and a leader of the Banu Nadlah branch of the

Khaybar as a result of having taken a poisonous food which was served to the Prophet (peace be on him) and his Companions by a Jewish woman.

- By the time Ibn Sina was born, Nuh ibn Mansur was the Sultan in Bukhara although he was struggling to retain control of the empire. Ibn Sina's father was the governor of a village in one of Nuh ibn Mansur's estates. He was educated by his father whose home was a meeting place for men of learning in the area. Ibn Sina was a remarkable child, with a memory ad an ability to learn which amazed the scholars who met in his father's home. By the age of 10 he had memorized the Quran and most of the Arabic poetry which he had read. When he reached the age of 13, he began to study medicine and he mastered it by the age of 16 when he began to treat patients. He also studied logic and metaphysics, receiving instruction from some of the best teachers of his day; in all areas he continued his studies on his own. In his autobiography, Ibn Sina stresses that he was more of less self-taught, although at crucial times in his life he received help.
- Dhu al-Hilm 'Amir ibn al-Zarb, d. 100 B.H./525 C.E., was a pre-Islamic chieftain, a man of wisdom, and and orator.He was recognized as an arbritrator in the famous Fair of 'Ukaz. He was among those pre-Islamic Arabs who considered wine unlawful.
- Hafsah, d. 45 A.H. /665 C.E., daughter of the second Caliph, Umar ibn al-Khattab, was one of the wives of the Prophet (peace be on him).
- Haman was a notable aide of Pharaoh in Moses' time. He was asked by the Pharaoh to build a towar so that the latter could climb up to see the god of Moses, in whom he disbelieved. He is mentioned in several *surahs,*often together with Pharaoh and Qarun.
- Hamnah bint Sufyan ibn Umayyah ibn 'Abd Shams who tried to put the utmost pressure on her son, Sa'd, to adjure Islam. She told him that she would not sit in shade, eat any food or drink anything until Sa'd gave up his new religious faith. This occasioned the revelation of the following verse:".. But if they press you to associate others with Me in My Divinity, (to associate those) regarding whom you have no knowledge (that they are My associates), do not obey them. And yet treat them well in this world ..." (Luqman 31:15).
- Heraclius Augustus, r.610-641 C.E., grew up in Roman Africa,defeated Phocas II (q.v.) and was crowned in Constantinople as Emperor. In the course of time Heraclius engaged in fierce military encounters with the Persians. After some intial setbacks, Heraclius was able to gain the upper hand against the Persians. Eventually, however, he came into conflict with

the nascent power of Islam (634-641 C.E.) which cost him Syria, Palestine and Egypt.

- Hud was an Arabian Prophet of the 'Ad, a people who lived in al-Ahqaf in northern Hadramawt. Hud has been mentioned in the Qur'an several times. For the Qur'anic refernces to Hud see especially 7:65-72.
- Huyayy ibn Akhtab, d. 5 A.H. /626 C.E., was a Jewish chieftain who was intensely hostile to, and engaged in conspiracies against, Islam. He was taken prisoner during the Battle of Qurayzah and put to death.
- Ibn ʻUmar, ʻAbd Allah, d. 73 A.H. /692 C.E., a son of the second Caliph, ʻUmar ibn al-Khattab, was an outstanding Companion in his own right, and is renowned for his piety and knowledge.
- Ibn Abdul Salam, His full name is Abu Muhammad al-Izz of Izz al-Din ʻAbu al-ʻAziz ibn ʻAbu al-Salam ibn Abi al-Qasim al-Sulami. He was born in Damascus in 577 or 578 AH and died in 660 AH. He studied with a number of eminent scholars such as Ibn as ʻAsakir and Sayf al-Din al-Amidi. A prominent Shafiʻl jurist of his time with a clear mystic inclination, Ibn ʻAbd al-Salam came into conflict with the Mamluk sultans of hi era in both Damascus and Cairo and was imprisoned and persecuted because of his denouncing their injustices and transgression of the shariʼah. His works cover various areas of Islamic scholarship, such as Qurʼan interpretation, jurisprudence both at the methodological and substantial levels, etc. He devoted his well-known book al-Qawaid al-Kubra (also known as Qawaid al-Ahkam fi Salih al-Anam) to the study and elucidation of the different aspects of masalih considered by the Shariʻah rules and injunctions.
- Ibn Abi Hatim, 'Abd al-Rahman, d.327 A.H./938 C.E., was a great scholar of *Hadith*, especially of its branch called *Rijal*.He also distinguished himself as a scholar of *Figh,Usul al-Figh, Kalam* and *Tafsif.*
- Ibn al- 'Arabi, Abu Bakr ibn Muhammad ibn 'Abd Allah, d.443 A.H./1148 C.E., was one of foremost commentators of the Qur'an. He was the author of a *tafsir* work entitled *Ahkam al-Qur'an*.As the title indicates, it is especially oriented to highlighying the legal aspects of the Qur'an.
- Ibn al-Arabi, Abu Bakr Muhammad ibn Abd Allah ibn Muhammad ibn al-Arabi was born in 468 AH in Sevilla, died in Marrakech in 543 AH and was buried in Fez. During his journey to the Mashreq (Islamic East) in pursuit of knowledge, he met al-Ghazali while in his mystical seclusion in Jerusalem. As a prominent Maliki jurist, he held the post of judge (qadi) in his home town. He was a multifaceted scholar and a prolific writer. His works cover many disciplines of Islamic scholarship such as Prophetic Traditions, Qurʼanic exegesis, jurisprudence, theology, history, etc

- Ibn al-Shikhkhir, Abu Abd Allah Mutarrif ibn al-Shikhkhir al-Tabi was a highly respected and influential scholar and traditionalist of the second class (tabaqah) of the Successors in Basra. Among other Companions of the Prophet he narrated from his father Adb Allah Ali ibn Abi Talib, Ammar ibn Yasir, 'Imran ibn al-Husayn and 'A'ishah. He is reported to have said concerning the question of predestination, "One must not climb and throw oneself and then, say: 'God has preordained me to fall. Rather, one must act carefully and do one's level best. Then if anything befalls him, he should realize that it has been predetermined." He died in 95/713.
- Ibn Arafa, Ibn 'Arafah is Abu 'Abd Allah Muhammad ibn 'Arafah al-Wirghimi, the descendant of a family from the town of Wirghimah in Southern Tunisia. He was born in Tunis in 716 AH and died in Jumada II, 803 AH. He was buried in al-Jallaz cemetery in the city of Tunes. He was known for his mastery of all the branches of science known in his time and became an established authority. He wrote many works on Qur'anec exegesis, jurisprudence legal theory, theology and logic. He led the prayers and was the deliverer of the Friday sermon in the zaytunah-Grand Mosque for fifty years. It also seems that there was some rivalry and competition as well as enmity between him and his contemporary and countryman, Ibn Khaldun. As for al-Ghubrini, his full name is Abu Mahdi Isa Ibn Ahmad ibn Ahmad ibn Muhammad al-Ghubrini al-Tunisi. He studied under ibn 'Arafah and was appointed to the office of chief judge in Tunis, inaddition toi being the deliverer of the Friday sermon at the Zayunah mosque. He died in either 813 or 815 AH.
- Ibn Hazm, 'Ali ibn Ahmad, d. 456A.H./1064 C.E., was an encyclopaedic scholar of Spain who was renowned for his contributions in different scholarly fields including law and jurisprudence, comparative religion, history, literature and poetry.
- Ibn Hisham, 'Abd al-Malik, d. 213 A.H. /828 C.E., was an outstanding historian who is best known for his Sirah (Biography) of the Prophet (peace be on him).
- Ibn Hisham, 'Abd al-Malik, d. 213 A.H./828 C.E., was an outstanding historian who is best known for his *Sirah* (Biography) of the Prophet (peace be on him).
- Ibn Ishaq, Muhammad, d. 151 A.H./768 C.E., was a scholar of Madinah, and one of the earliest historians and biographers of the Prophet (peace be on him). His biography of the Prophet (peace be on him) has had a lasting influence on the works of that genre.

- Ibn Kathir, Isma'il ibn 'Umar, d. 273 A.H. /1373 C.E., was a famous traditions, historian and jurist and the author of one of the best-known commentaries on the Qur'an.
- Ibn Kathir, Isma'il ibn 'Umar, d. 774 A.H./887 C.E., was a famous traditionist, historian, jurist and author of one of the best known commentaries on the Qur'an.
- Ibn Majah, Muhammad ibn Yazid, d. 273 A.H. /887 C.E., was a famous traditionist whose collection of Traditions (Kitab al-Sunan) is one of the six most authentic collections of Hadith.
- Ibn Majah, Muhammand ibn Yazid, d. 273 A.H./887 C.E., was a famous traditionist whose work, *Kitab al-Sunan*,is one of the six most authentic collections of *Hadith*.
- Ibn sa'd, Muhammad, d. 230 A.H. /865 C. E., historian, traditionst and the secretary of al-Waqidi (s.v. al-Waqidi), is know for his al-Tabaqat al-Kubra, a major biographical dictionary of the early period of Islam.
- Ibn Shabbah, 'Umar, d. 262 A.H./876 C.E., was a poet and historian who was known for haveing committed to memory a large number of traditions. A scholar from Basrah, he wrote a large number of works on several subjects but especially on history and poetry.
- Ibn Sina, Abu 'Ali al-Husayn ibn 'Abd Allah ibn Sina (Avicenna) was born in 980 AC in Kharmaithen (near Bkhara) Central Asia (now Uzbekistan) and died in June 1037 in Hamadan Persia (Now Iran). Ibn Sina is often known by his latin name of Avicenna. We know many details of his life, for he wrote an autobiography that has been supplemented with material from a biography written by one of his students, Abu Ubayd al-Juzjani. The course of Ibn Sina's life was dominated by the period of great political instability through which he lived. The Samanid dynasty, which ruled at that time, controlled Transoxania and Khorasan from about 900. Bukhara was their capital and it, together with Samarkand, was the cultural centers of the empire. However, from the middle of the 10the century, the power of the Samanids began to weaken.
- Ibn Sirin, Muhammad, d. 110 A.H. /729 C.E., was noted second generation scholar of Basrah, who was especially prominent as traditions.
- Ibn Taymiyah, Taqi al-Din Ahmad ibn 'Abd al-Halim, d. 728 A.H. /1328 C.E., was one of the most outstanding theologians and jurists of Islam. His ideas have had an immense impact on Muslims, especially during the last two centuries.
- Ibn Zayd, Jabir, d. 92A.H./712 C.E., was a jurist who belonged to the generation of Successors (*Tabi'i*). He was a disciple of 'Abd Allah ibn 'Abbas.

- Ibrahim al-Nakha'I, d. 96 A.H. /715 C.E., was a most prominent jurist of Kufah in the second generation of Islam and played a major role in the development of the Iraqi school of law.
- 'Ikrimah ibn 'Abd Allah al-Barbari al-Madani, d. 105 A.H./723 C.E., a *mawla* of 'Abd Allah ibn 'Abbas, was a Successor (*Tabi'i*) who was celebrated as a scholar of *Trfsir* and *Maghazi*.
- 'Ikrimah ibn Abi Jahl, d. 13 A.H./634 C.E., was a Companion of the Prophet (peace be on him) whose father, Abu Jahl, was one of the staunchest enemies of Islam. After conversion to Islam, however, 'Ikrimah fought valiantly for the cause of Islam and was martyred in the Battle of Yarmuk.
- Imra'al-Qays ibn Hijr ibn al-Kindi (d.80 B.H./545 C.E.), was a pre-Islamic poet, who ranks among the best poet of Arabic.
- 'Imran ibn Husayn ibn 'Ubayd, d. 52A.H./672 C.E., was among the Companions known for their knowledge. He was at the head of the Khuza'ah tribesmen on the day of the conquest of Makkah.
- In addition to this vital task, Zayd ibn Thabit was a jurist who was highly respected for his scholarship by fellow Companions durings the first century A.H. According to hadith historians, Zayd related 92 traditions. When he died in 45/665, Abu Hurayrah said: "The Scholar of this nation has died today; may God make Ibn 'Abbas his successor."
- In his juristic thinking, he combined the traditionalist approach of the Jurists of the Malikite School of Kairouan with the rationalistic and argumentative approach of the Malikites of Baghdad. In Islamic jurisprudence, both usul and furu, al-Mazari had a special penchant for issues of a greator level of Juristic differences (khilaf ali) in his quest for the higher objectives of the Shar'ah. In addition to his commentaru on al-Juwayni's Burhan (see note 5), he produced many valuable workes in different fields of Islamic scholarship. They include, among others, Sharh al-Talqin (a commentary on the Talqin, a compendium on Maliki jurisprudence by the grat Maliki jurist of Baghdad, al-Qadi Abu Muhammad 'Abd al-Wahhab who died in 422 AH), al-Mu'lim bi-Fawa'id Muslim (partial commentary in three volumes on the famous Hadith collection of the graet traditionalist Muslim ibn al-Hajjaj (d. 261 AH). Al-Mazari died at the age of 83 in 536/1141 in the coastal city of Mahdia and was buried in the nearby town of Monastir, where his rave is still preserved as a venerated shrine for many Tunisian Muslims.
- In Kairouan, he studied jurisprudence with Muhammad ibn Abi Zayd, an authority in Maliki doctrines in the whole Maghreb, and Abu al-Hassan al-Qabusi, another authority in Qur'an readings (qia'at) and Hadith. In 393 he left for Cordoba where he settled for the rest of his life and became one of its

foremost scholars. He died in 437/1045 at the age of eihty-two. Makki’s ain focus was the Qur’an and the disciplines enabling one to read it correctly and interpret it soundly. His numerous works include, among others, al-Tabsirah (both on Qur’anic readings) and al-Hidayah ila Bulugh al-Niayah (Qur’an commentary).

- Isaac (Ishq) was a Peophet and a son of Abraham from his wife Sara (Sarah). Isaac remained with his father and is buried in Hebron.
- Jabir ibn ‘Abd Allah, d. 78 A.H. /697 C.E., was a Companion who is noted for having transmitted a very large number of traditions from the Prophet (peace be on him).
- Jabir ibn 'Abd Allah, d. 78 A.H./ 697 C.E. was a Companion who is noted for having transmitted a very large number of traditions from the Prophet (peace be on him).
- Jacob (Ya'qub) was Isaac's son and Abraham's grabdson. Jacob's Hebrew name was Israel which explains that his descendants came to be known as "Children of Israel". After Joseph assumed power in Egypt, Jacob came to Egypt at his son's invitation and settled there.
- Ja'far al-Sadiq ibn Muhammad al-Baqir ibn 'Ali Zayn al-'Abidin ibn al-Husayn ibn 'Ali, d. 148 A.H./675 C.E., is considered by the Twelver-Shi'ites to be thier sixth *imam*.He was a great scholar and a pious man. Famous scholars such as Abu Hanifah and Malik ibn Anas benefited from his knowledge.
- Jesus ('Isa), the son of Mary, was among the most exalted of God's Prophets, who had a miraculous birth from his virgin mother. Jesus' birth has, therefore, been likened in the Qur'an to God's direct creation of Adam (that is, without the mediation of any father or mother). Notwithstading Jesus' miraculous birth, he was a human being rather then God, albeit he was God's Messenger. While the Qur'an lavishes glowing praises on Jesus it categorically debunks the notion that he was invested with Divinty and altogether denies the conception of a Triune God with Jesus as the Second Person.
- Ka‘b ibn al-Ashraf, d. 3 A.H. /624 C.E., was a Jewish chieftain and poet, who used his poetic skill to ridicule and insult the Prophet (peace be on him) and his Communions. He also incited various tribes to fight against the Muslims, and was put to death by the Muslims for his vile hostility.
- Khabbab ibn al-Arat, d. 37A.H./657 C.E., a Companion and one of the early converts to Islam, was mercilessly persecuted by the opponents of Islam in Makkah.

- Khalid ibn al-Walid, d. 21 A.H. /642 C.E., was a military genius of Makka who initially opposed Islam but converted to it before the conquest of Makka. After the death of the Prophet (Peace be on him) he played a major role in suppressing the rebellion against Islam.
- Khusraw II, r. 590-628, who assumed the title to Parver ("the Victorious"), was the twenty-second Sasanian king of Persia under whom the empire achieved its greatest expansion. Eventually defeated in a war with the Byzantines, he was deposed in a palace revolution and was put to death.
- Korah (Qarun), who was born among the Israelites but subsequently turned against them, had immense riches which made him vain and arrogant, forgetting that he owed all his wealth to God. Thanks to his iniquity, he became a close collaborator of Pharaoh. At last, God retributed him by causing the earth to swallow him and his mansion.
- Labid ibn Rabi'ah ibn Malik al-'Amiri, d. 41 A.H./661 C.E., was a famous poet of Arabic as well as a brave fighter. He was born in pre Islamic times but new faith and is considered to be a Companion.
- Lot (Lut) was the nephew of the Propht Abraham (peace be on him) who oversaw his religious and moral upbriging. He was born and spent the earlier part of his life in Iraq but subesquentlly embarked on a sojourn through several lands and eventually settled in the vicinty of the Dead Sea in the present-day Jordan. Lot's people were steeped in evils, especially sondomy. Eventually God utterly destroyed them by bringing upon them a scourge from heaven.
- Makhul ibn abi Muslim, d. 112 A.H. /730 C.E., was a scholar of Hadith and Fiqh who, after journeying through different lands. Settled in Damascus and was recognized as one of the greatest jurists of Syria in his time.
- Makhul ibn Abi Muslim, d. 112 A.H./730 C.E., was a scholar of *Hadith* and *Fiqh.*After journeying though different lands, he setted in Damascus and was recognized as one of the greatest jurists of Syria in his time.
- Malik ibn Anas, d. 179 A.H. /795 C.E. a Comanion, was known for his knowledge of Law; he was among those who undertook the collection of the Qur'an and was appointed by the Prophet (peace be on him) as a judge in Yaman.
- Malik ibn Anas, d. 179A.H./795 C.E., was a famous traditionist and jurist of Madinah, and founder of one the four Sunni schools of law in Islam. His *al-Mawatta',* a collection of traditions as well as legal opinios of the jurists of Madinah, is one of the earliest extant works of *Hadith* and *Figh.*
- Maurich was a Byzantine Emperor, r. 582-602 C.E., who helped transfrom the shattered empire into a new and well-organised medieval Byzantine Empire.

Maurice launched a series of wars against Persians, Slavs, Avars and Lombards which drained the imperial treasury and necessitated collection of high taxes. The ensuing treasury and necessitated collection of high taxes. The ensuing discontent led to the overthrow of Maurice and the crowning of Phocas as emperor.

- Moses (Musa), is one of the greatest messengers of God (*Ullu al-'azm min al-Rusul*).Aided by his brother Harun (Aaron), he was sent to deliver the Children of Israel from the tyranny and oppression they suffered at the hand of the Pharaoh of Egypt. His story is mentioned in many places in the Qur'an. According to Jewish sources, he was born on the 7th of Adar 2368 and died on the 7th of Adar 2488 of the hebrew calendar.
- Muhammad ibn Ka'b al-Qurazi, d. between 108 A.H. and 120 A.H., was the son of Ka'b ibn Sulaym al-Qurazi, a Jew of the Quaryzah tribe who converted to Islam and was a Companion. Muhammad ibn Ka'b became known for his accounts regarding the relations between the Jews and the Prophet (peace be on him) and his knowledge of the history of the Jews as such.
- Muhammad ibn Maslamah, d. 43 A.H./663 C.E., was a Companion who took part in the Battle of Badr and other military campaigns under the Prophet (peace be on him) except the campaign of Tabuk.
- Mujahid ibn Jabr, d. 104 A.H./722 C.E., was a Successor (*Tabi'i*) and among the foremost Qur'an-commentators of Makkah in his time. His *Tafsir*, which has been published recently, is one of the earliest extant works of that genre.
- Muqatil ibn Sulayman, d. 18 A.H. /767 C.E., was one of the distinguished scholars in the field of Tafsir (Qur'an- Commentary). Who has left behind a number of works in the field of Qur'anic science.
- Muqatil ibn Sulayman,d. 150 A.H./767 C.E., was one of the distinguished scholars of *Trfsir* (Qur'an-commentary), who wrote a number of works in the field of Qur'anic learning.
- Muslim ibn al-Haffaf al-Nisaburi. d. 261 A.H. /875 C.E., was one of the greatest scholars of Hadithi. Whose work is one of the six most authentic collections of Hadith and ranks second in importance only to that of al-Bukhari.
- Muslim ibn al-Nisaburi, d. 261A.H./875 C.E., was one of the greatest scholars of *Hadith*.His work is one of the six most authentic collections of *Hadith* which ranks second in importance only to that of that of al-Bukhari.
- Nadwi, Sayyid Sulayman, d. 1953 C.E., was among the foremost South Asian scholars of Islam in the twentieth century. He shared with his teacher, Shibli Nu mani, the authorship of a 7-volume work titled *Sirat al-Nabi.* Apart from this encylcopaedic work, Nadwi wrote a number of outstanding books

including *Ard al-Quran, 'A'ishah, Arabon ki Jahazrani, Arab awr Hind ke Ta'alluqat, Shi'r al-Ajam* and *Khayyam.* He ably served Dar al-Musannifin. Azamgarh and Nadwat al Ulama Lucknow for many years.

- Noah (Nuh) was one of the greatest Prophets. He lived in Iraq and God granted him an inordinately long life. He spent 950 years calling his people to worship none but the One True God and to follow the ways of righteousness. His people contemptibly spurned his calls and remained immersed in their evil ways. In retribution God punished them by the Flood which destroyed all except those who boarded Noah's Ark.
- Parwez, Ghulam Ahmad (d. 1985 C.E.) was a civil servanr in the Government of India and later in the Government of Pakistan. In 1938 he started a magazine called *Tulu-I Islam* ("Rise of Islam"). Parwez had both the ability and the penchant for waiting. He authored close to two dozen books on Islam. He authored close to to dozen books on Islam. He became known in the main as one of the leaders of the trend known as *Inkar-I Hadith* ("Denial of the [authority and authenticity] of *Hadith*").
- Phocas II, r. 602-610 C.E. ascended the throne from the Bayzantine Emperor Maurice (q.v.) and was himself overthrown by Heraclius after losing a civil war.
- Pope Serigus I , r 687-701 C.E., a naïve of Antioch, was educated in Sicily, ordained by St. Leo II, and elected Pope, Offended by hs rejection of the canons of the Trullam Council of 692, Justinian II ordered his arrest and transportation to Constantinople. However, the order could not be carried out owing to strong opposition.
- Qatadah ibn Di'amah, d. 118 A.H./736 C.E., was a erudite scholar of Basrah who was known for his knowledge of Qur'anic exegesis, *Hadith,* Arabic language and genealogy.
- Quss ibn Saidah al-Iyadi was known for both his wisdom and for wide acceptance by the Arabs as an arbitrator of disputes and also for his effective eloquence. It seems certain that he was a *Hanif,* believed in monotheism and was opposed to idol-worship. He also relished withdrawal from the humdrum of day-to-day life and lived in the manner of ascetics and monks. While the year of his deasth appears uncertain, it was reportedly in the fifteenth year after his birth that the Prophet (peace be on him) saw him in the Fair of Ukaz. The extant specimens of his oration are excellent pieces of Arabic rhymed prose.
- Rustam is a legendary figure fo Persia known for his valour and chivalry and is credited to be a warior of extraordinary qualities. He is credited, in Persian legend, with the conquest of many territories in and around Perisa and with

playing a great role in extricating the Perisan monarchs from their difficulties.

- Sa'id ibn al-Musayyib ibn Hazm ibn Abi Wahb was born is 13 AH. And died in 94 AH. A notable of the tribe of Banu Makhzum, he was the foremost in traditions, jurisprudence and the Qur'an interpretation among the generation succeeding the Companions, the Tabi'um. He narrated from his father 'Uthman ibn 'Affan, 'Ali ibn Talib, and other Companions.
- Sa'd ibn Abi Waqqas. 50 A.H./670 C.E., was one of the heroes of early Islam who took part in amny battles duing the life of the Prophet (peace be on him). His fame, however, rests primarily on his command of the Muslim army which led to the conquests of Iraq during the Caliphate of 'Umar.
- Sa'id ibn al-Musayyib, d. 94 A.H./713 C.E., was a foremost scholar and jurist of the generations of successors (*Tabiun*). One of the seven recognized jurists of Madinah, he was known for his knowledge of *Hadith* and *Fiqh* as well as for his piety and devotion.
- Sa'id ibn al-Musayyib, d.94 A.H. /713 C.E., was a foremost scholar and jurist of the generation of Successors (Tabi'un). One of the seven recognized jurists of Madina, he was known for his knowledge of Hadith and Fiqh as well as for his piety and devotion.
- Safiyha, d. 50 A.H. /670 C.E., was the daughter of Huyayy (s.v. Huyayy ibn Akhtab) who converted to Islam from fideism where after the Prophet (peace be on him) took her in marriage.
- Sahl ibn Sa'd al-Khazraji, d. 91 A.H./710 C.E., was distinguished Comapnion who died around the ripe age of 100. Some 188 traditions have been reported from him.
- Salih was an Arabian Prophet of Thamud, a people who have been mentioned many a time in the Quran, Salih lived before the Prophets Moses and Shuayb. His mission was to direct his people to righteousness, but they refused to respond to his call whereupon they were destroyed.
- Salim, the mawla of Abu Hudhayafah, d. 12 A.H. /633 C.E., originally a slave of Persian origin, was liberated from slavery by the wife of Abu Hudhayfah. Salim was among the early converts to Islam and ranked among the Companions most noted for their knowledge of the Qur'an.
- Sarmah ibn Qays ibn Malik al-Najjari al-Awsi, d. circa 5 A.H. / circa 627 C.E. was a pre-Islamic poet who became disposed to monasticism and abandoned the worship of idols and images. He had a very lonf life and embraced Islam at a very old age, in the year of the Muslim's immigration to Madinah.
- Shams al-Din Abu al-Hasan 'Ali ibn Isma 'il ibn Ali 'Ali ibn 'Atiyah was born in 557 AH and died in 618 AH. He was a jurist, legat theorist (usuli) and

Qur'an commentator. His works include al-Tahqib wa al-Bayan fi sharh fi Sharh al-Burhan (in usal al-fiqh) and Safinat al-Nijat (a commentary on al-Ghazali's Ihya''ULum al-Din).

- Shiroe, r.628 C.E., a son of Khusraw II, was proclaimed king of Persia as Kavad II after the killing of his father. Khusraw II died the same year he was coronated. As part of agreement with the Emperor Heraclius, Kavaw returned the Tue Cross to the Romans.
- Shuayb, an Arabian Prophet of mdyan, was descendant of the Prophet Abraham (q.v.). He lived before Moses and after the Prophets Hud and Salih. His tomb is said to be in Hittin in Palestine.
- Shurayyah al-Qazi, Abu Umayyah Shurayh ibn al-Harb ibn Qays al-Kindi, known as justice Shurrayh (Shurayh al-Qadi.). A trustworthy traditionalist, an eminent jurist, and a man of vast knowledge of Arabic literature and poetry, he had the office of judge furing the rule of 'Umar ibn al-Khattab, 'Uthman ibn 'Affan, 'Ali ibn Abi talib, and Mu'awiyah ibn Abi Suffan. He died in 78 AH.
- Suhayb ibn Sinan ibn Malik, also known as Suhayb al-Rumi, d.38 A.H./659 C.E., a distinguished Companion, was famous for his skill in archery and for his familiartity with military tactics whi proved of much benefits to the Muslims, especially durin the Battle of the Ditch (*Khadaq*).
- Suhayl ibn 'Amr, d. 18 A.H./639 C.E., embraced Islam on the ady Makkah was conqured. Before that he was the representative of the Quraysh when they negotiatited a peace agreement with the Prophet (peace be on him) in Hudaybiyah.
- *Surah Ya Sin:* 36:78-79
- Ta'us ibn Kaysan, d. 106 A.H. /724 C.E., was Tabi'I (Successor) who is known for his knowledge of Law and Hadith, and for his boldness in admonishing the rulers.
- Tarafh ibl al-Abd ibn Sufyan Ibn Sa, d. circa 6p B.H./circa 564 C.E., was a first-rate poet of the pre-Islamic times. He is known for his dexterity in *hija*(satire). He was presumably put o death in this early youth at the insistence of the potentate Amr ibn Hind who was incensed by his satire.
- Thamud were a people who lived in ancient times in Madain Salih (or al-Hijr) which lies in Wadi al-Qura between Hijaz and Jordan. The Prophet Salih (peace be on him) was raised amond them and invited them to worship and fear God, obey God's Messenger, and not to follow those who commit excesses and spread corruption on earth. Salih (peace be on him) especially urged them not to cause any harm to she-camel that had been consecrated to God. They, however, willfully disregarded that directive and hamstrung the

she-camel whereupon God's chastisement overtook them and completely annihilated them.

- The Zahiris constitute a school of law in Islam which was founded by Da'ud ibn Khalaf, d. 207 A.H. /884 C.E. The characteristic of the school is that it considers legal unjunctions to consist merely of clear statements embodied in the Qur'an and Sunnah and is strongly opposed to ra'y, qiyas, istihsan, etc., which are accepted in varying degrees as valid sources of laws by the jurists of other schools of Islamic Law. This school did not attain much popularity among Muslim and hardly exists today though in the fifth Islamic century/tenth century C.E. it found a very brilliant and erudite representative in Ibn Hazm, d. 456 A.H. /994 C.E., of Spain.
- This great jurist and traditionalist of Cordova was born in 404 and died in 497 AH. His book Aqdiyat Rasul Allah (SAAS) (The judicial Verdicts of Goods Messenger peace and blessings of God be upon him) was published in different editions in Halab (Aleppo), Beirut, and al-Qasim. His other books include Nawazil al-Ahkam al-Nabwiyyah. He taught many able students such as the great Maliki jurist and judge (grandfather of the jurist-Philosoher Ibn Rushd or in Latin Averroes) Abu al-Walid ibn Rushd, author of al-Bayan wa al-Tahsi-a major Reference of Maliki juristic doctrines. Mmm
- Together with al-Farabi, Ibn Sina's legacy lies mainly in philosophical studies and medicine. His works include, among others, al-Shifa, al-Najat, and al-Isharat wa al-Tnbihat in philosophy and logic and al-Qanun fi al-Tibb in medicine.
- Twice rejected for military service, Zayd continued his efforts to works for the cause of Islam. Though young in age, he was academically inclined and was also gifted in languages. He could read and write more non-Arabic languages than one like Persian, Coptic, Suryani, Hebrew, etc. (a rare accomplishment at that time). He excelled in Arabic and distinguished himself in the recitation of the Qur'an. For these reasons, the Prophet selected him as his Chief Scribe of the Quran (Katib al-nabiyy), despite his youth. It has been reported that the Prophet requested Zayd to learn Hebrew and Syriac to assist him with diplomatic letters and correspondence, latter sent to neighboring heads of state, inviting them to Islam. Then, in his early twenties, Zayd became an exponent of the Qur'an and one of those who had memorized the existing Revelation as taught by the Prophet himself. Hadith records also state that Zayd had the unique distinction of witnessing the Prophet's recitation before the argel Jibril during the last Ramadan.

- Ubayy ibn Ka'b, d. 21 A.H. /642 C.E., was a prominent Companion who was knowledge about the Scriptures and played a key role in the collection of the Qur'an.
- Ubayy ibn Khalaf was Umayyah's brother and was extremely hostile to the Prophet (peace be on him). He typifies the attitude of the unbelieving Quraysh who considered resurrection of the dead [to face God's judgement] a fantastic folly. Ubayy picked up a piece of decayed bone and said: "O Muhammad, do you believe your Lord will revive this bone?" This question occasioned the revelation of the verse: "He strikes for Us a similitude and forgot his own creation. He says: 'Who will quicken the bones when they have decayed?' Say: 'He Who first brought them into being will quicken them…..'".
- Umar ibn al-khattab, d. 23 A.H./644 C.E., was the second Caliph of Islam under whose Caliphate the Islamic state became increasingly organized and its frontiers vastly expanded.
- Umayyah ibn Abi al-Salt, d. 5 A.H./626 C.E., was poet and savant of Taif. He want to Damascus before the advent of Islam and was well-versed in the ancient Lire. He abstained from intoxicating drinks and idol worship. After the Battle of Badr, Umayyah returned to Taif from Damascus and lived there till his death.
- Umayyah ibn Khalaf ib Wahb, d. 2 A.H./624 C.E. one of the most influential leaders of the Quraysh and an inveterate enemy of Islam, was put to the sword in the Batlle of Badr.
- Umm Salamah, hind bint Umayyah, d. 62 A.H. /681 C.E., was one of the wives of the Prophet (peace by on him).
- Uqbah ibn Amir, d. 58 A.H./678 C.E., was companion of the Prophet (peace be on him) who was later appointed governor of Egypt.
- Uqbah, ibn Abi Muayt Ibn Umayyah, d. 2 A.H./624 C.E., was one the staunchest enemies of the Prophet (peace be on him) who caused him much hurt. He was put to death after the Batlle of Badr.
- Utbah ibn Rabiah, d. 2 A.H./ 624 C.E., was among the noteworthly personages of the Quraysh before Islam. He was respected for his maturity, forbearance and benevolence. On the occasion of *Harb al-Fijar* his wisdom and tactfulness bore good results and the contending parties were persuaded to come to an agreement. He was killed in the Battle of Badr.
- Waki ibn Salamah ibn Zuhayr al-lyadi was one of the judges of pre-Islamic times. He was entrusted with the responsibility of the sacred House of Ka'bah after Jurhum.

- Waraqah Ibn Nwafil ibn Asad ibn 'Abd al-Uzza was relative of Khadijah, the first wife of the Prophet (peace be on him). Warqqah had renounced idolatry even before the advent of the Prophet (pece be on him). He was knowledgeable about religions, knew Hebrew, and had embraced Christianity. After the Prophet (peace be on him) received the first revealation at the Cave of Hira, Khadijah took him to Waraqah. After hearing from the Prophet (peace be on him) what had transpired Waraqah assured him that the angle who came to him was the same who had come earlier to Moses.
- Zayd ibn 'Amr ibn Nufayl ibn 'Abd al-Uzza, d. 17 B.H./606 C.E., is distinguished by the fact that even though he lived in pre-islamic times he held women in high esteem. He did not live to witness the advent of Islam. He however, detested the worship of idols and images and considered himself to be belong to Abraham's faith. He was among a small group of persons in pre-Islamic Arabia who are called *hunafa* (sing. *Hanif*). A Makkan of the Quraysh tribe, Zayd died when the Prophet (peace be on him) was thirty-five years oldl in other words, before his designaton as a Prophet. Zayd had given up idol-worship but had neither embraced Judaism nor Christianity. He was severely opposed to the pre-Islamic custom of killing daughters in their infancy and abstained from eating the flesh of animals offered ot idols.
- Zayd ibn Thabit played a key role in the collection of the written Qur'an. The first Caliph, Abu Bakr, commissioned him for this task upon a suggestion by 'Umar ibn al-Khattab in the wake of the Battle of Yamamah (12AH) in which many huffaz (memorizers of the Qur'an), 70 according to some reports, was killed. 'Uthman ibn Affan the third Caliph decommissions Zayd as head f a comitee entrusted with task of preparing copies of the Qur'an. The work of this committee resulted in what has come to be known as "Uthman's Mushaf" (Uthmani Codex).
- Zayd ibn Thabit, d. 45 A.H. /665 C.E., was a prominent Companion of the Prophet (peace be on him) who played a major role in the collection of the Qur'an.
- Zayid ibn Thabit ibn al-Dhahhak (Abu Kharijah) was born in Madinah eleven years before the Hijja (in 611 A) but was raised in Makkah. His father was killed when he was 6 years old, and at the age of 11 he emigrated to Madinah, at approximately the same time as the Prophet in 622 A.C. Zayd and his family were among the first Ansars (helpers) to accept Islam, when members of his clan embraced the faith and swore allegiance to the Prophet in I AH. Not yet 13, Zayd personally appealed to the Prophet to let join the

Muslim army, which was preparing for the Battle for Badr (2 AH) against the Makkan pagans. On account of his youth, the Prophet refused his request and set him home, much to the distress of his mother, al-Nawar bint Malik. A couple of years later, he again attempted to enlist in the Muslim army preparing for the Battle of Uhud (3 AH) with a group of other teenagers, some of whom were admitted to the ranks, but the Messenger again rejected Zayd owing to his youth and inexperience. Maybe the Prophet foresaw the heavy burden history would later place on the shoulders of this young man!

- Zoroaster or Zarathustra, also referred to as Zartosht, was an ancient Iranian religious figure ad poet. The hymns attribute to him are scriptural basis of Zoroastianism. There is no certainty about the age in which Zoroaster lived, the estimates varying from about 6000 B.C. to the middle of the seventh B.C. , the latter date being moer plausible.
- Zuhayr ibn Abi Sulma, d. 13 B.H. /609 C.E., was a pre-Islamic poet who is held in the highest esteem for the elegance of his poetry.

BIBLIOGRAPHY

- Al-Suyuti, Jalal-Din Abdur Rahman bin Abu Bakr (d. 911 A.H.)
- *al-Itqan fi Uloom at-Qur'ar* cairo, al-Halabi, 1951.
- Al-Mawardi, Abul Hasan Ali bin Muhammad bin Habib-al-Basri, al-Baghdadi,
- *al-Ahkamus Sultaniyah wal-Walayatud Diniyah*, Egypt, Mustafa al-Halabi, 1960
- Al-Amidi, al-Shafie, Saiful Din Abul Hasan Ali bin Abu Ali-
- *al-Ihkam fi Usoolil Ahkam*, Darul Fikr, Beirut 1996.
- Al-Ghazah al-Shafie,
- *Hamid b. Muhamamd*, *Ihyau Uloomid-Din*, Darul Kutubil Ilmiyah, Beirut, 1998.
- Ibn al-Qafit (d.666 AH)
- *Akhbarul Kukama*, (Print in Egypt)
- Dehlawi, Shah Waliullah (d. 1176 AH)
- *Izalul Khifa an Khilafatil Khulafa*, Deoband Hafizi Book Depot.
- Numani Shibli/ Nadwi S. Sulaiman
- *Islam aur Mustashriqin,* Darul Musannifin, Azamgarh India 1986.
- Misri, Ibn Nujaim (d. 970 A.H.) Zainul Din bin Ibrahim, *al-Ashbah-wal-Nazair* (Deoband)
- Zuhair, Abun-Noor –
- *Usulul-Fiqh* (Egypt)
- Khallaf, Abdul-*Wahhab Usul-Fiqh* (Egypt)
- Al-Juzi, al-Hambali-Ibnul-Qayyium (d. 751 AH)
- *Illamul-Muwaqqien an Rabbil Alamin*, Beirut, Darul Fikr 1955.
- Thanawi, Maulana Zafar Ahmad-
- *Illaus Sunan*, Idaratul Qur'an, Karachi (1415 AH)
- Al-Zarali Khairud Din al-Iellam, al-Matba'ah al Arabiykah, Egypt 1928.
- Hyderabadi, Hamidullah Dr.
- *e-Islam Imam Abu Hanifa Ki Tadwin-e-Qanun*, Print Hyderabad.
- Al-Babani, Ismail Pasha bin Muhammad Amin bin Mir Salim
- *Izahul Maknun fi-Zaili ala kashfiz-Zunun* (edition 1402)
- Al-Misri Ibn Nujaim,
- *al-Bahrur Raiq fi sharh Kanzid Daqaiq*.
- *Buhus fi Shariatul-Islamiya wal-Qanunil Majmuatil Usmaniyah*, (Edition 1977, Cario)
- Al-Kasami Hanafi Malikul Ulama Allaud-Din Abu Bakr bin Sand,

- *Badai al-Sanaifi Tartibil Sharai* (Ed, Deoband)
- Ibne Kathir, al-Hafiz Abul Fida,
- *al-Bidayah wal-Nihayah,* al-Ma'arif Beirut 1966.
- Firozabadi al-Shirazi Majdud Din Abu Tahir Muhammad bin Yaqub,
- *Basair dhawit tamyiz fi Lataife Kitabullahil Aziz.*
- *Indian Constitution* (published by : National Bureau for the Promotion of Urdu 2001)
- Al-Hanafi Qasim bin Quthbagha-
- *Tajut-Trajim fi Tabaqatul-Hanafiyah.*
- Tabari Abu Ja'afar (d.310 AH)-
- *Trikh-e-Kabir* al-Istiqamah, Cairo 1358 AH
- Al-Jazri Ibn Athir (544-606 AH)
- *Tarikh al-kariul*, print Matba'ah Dhatit Tahrir.
- Khatib Hafiz Abu Bakr Ahmad bin *Ali-Tarikh-e-Baghdad* (Darul Kutubil Ilmiyah)
- Hussain Ahmad Farraj-*Tarikh al-Fiqhil Islami,* Print. Al-Maktaba at-Qanuniyah Darul Jamia, 1988.
- Manna al-Qattan Dr – Tarikh-al-
- *Tashri al-Fiqhil Islami.*
- Al-Ashqar Sulaiman Umar Dr. –
- *Tarikh al-Fiqhil Islami.*
- Ali Hasan Abdul Qadir –
- *Tarikh al-Fiqhil Islami.*
- Muhammad Hamzah –
- *al-Talif bainal-Firaq* (Dimashq Dare Qutaibah 1985)
- Al-Suyati Abdur Rahman Jalalud Din-
- *Tabyizus Sahifa fi Manaqib Abi Hanifa* (Hyderabad 1317 AH)
- Alwani Fayyaz Jabir Taha –
- *Tahqiq Muqaddimah ala al Mahsul li al-Razi* (Publised by Jamiatul Imam Md. B. Sand al-Islamiyyah 1979)
- Al-Zahabi, Abu Abdullah Shamsud Din –
- *Tazkiratul Huffaz*-Daru Ihya li-Turathil Islami.
- Umri Azai Md. Arif –
- *Tazkirah Mufassirin Hind Vol.-I* (Darul – Musannifin, Azamgarh 2006)
- Shahid Audah Abdul Qadir Dr –
- *Al-Tashri al-Jinai al-Islami* (Egypt edition)
- Shahid Audah Abdul Qadir Dr –
- *Tatbiqus Shariatil Islamiyah fil Biladil Arabiyah.*

- Razi Fakhrud Din Imam –
- *Tafsir Kabir-Darul Fikr* IIIrd edition 1985, Beirut.
- Asqalani, Ibn Hajar al-Hafiz-
- *Taqributt Tahzib*
- Snuyuti – Tanwirul Hawalik (al-Nadwa al-Jadidah, Beirut)
- Al-Asqalani Ibn Hajar Hafiz –
- *Tawali al-Tasis fi manqib Muhammad bin Idris al-Shafie* (Bolaq Egypt al-Amiriah 1301 AH)
- Sadrus Shariah Abdullah bin Masud Hanafi- *Al-Tawzih ala – al-Tanqih* (Pub. Darul Kutubil Ilmiyah, Beirut 1996)
- Al-Zahabi Shamsud Din:
- *Tazib al-Tahzib* pub. Hyderabad 1326.
- Tirmizi Imam Abu Isa –
- *Jami Tirmizi*
- Sabri Imadad Dehlavi –
- *Jurm-o-saza* Vol.3
- Al-Subki, Qazi-al-Qudat Ibn Tammam at Shafie
- *Jam'ul-Jawami* (Mumbai, Asahul Matabi)
- Ibn Abul wafa Muhind Din Abu Muhammad Abdul Qadir
- *al-Jawaharul Muzi'ah fi Tabaqatil Hanafiyah*, printed at Karachi.
- Mustafa Muhammad Afindi,
- *al-Jawharul Nafis fi Tarikh Imam Md. Bin Idris*, Print al-Husainiyah, Egypt.
- *Charagh-e-Rah special issue on Islami Qanun* June, 1958
- Shami, Ibn Abidin (d. 1252 AH)
- *Hashiyah Ibn Abidin* (Maktaba al-Amiriyah, Egypt)
- Dehlawi, Shah Wali Allah,
- *Hujjatil Allahil Baligha*, (Delhi edition)
- Suyuti, Jalalud Din (849-911 AH)
- *Husnul Muhadhara fi Akhbar Misr wal-Qahira.*
- Rahim Baksh Muhammad Maulana –
- *Hayate Wali* (Delhi)
- Makki Shihabud Din Ibn Hajar –
- *Al-Khairatul Hisan.*
- *Dairatul Ma'arif al-Islamiyah,* prepared under and published by the Panjab University, Lahore, 1971
- Asqalani Ibn Hajar Ahmad bin Ali Ahmad al-Kanani
- *al-Durrarul-Kamina fi Ayanil Miatil Saminah*, Darul Jil, Beirut.
- *Dawat biweekly* (special issue 1983)

- Qidwai Md. Hashm Dr.
- *Dunya Ki Hukumaten*
- Al-Makki Ibn Farhun (d.799 AH)
- *al-Dibajal Muzahhab* (Darul Kutubil Ilmiyah, Beirut, 1996)
- Nawawi Muhiyyudin Abi Bakr Yahya bin Sharf (d. 676 AH)
- *Riyazus Salihin*
- Al-Juzi Ibn al-Qayyim Shamsud Din al-Hanbali
- *Zadul Ma'ad fi Hadyi Khairil Ibad* (d.255 AH)
- Al-Qazwini, Imam Ibn Majah
- *Sunan Abi Dawood* (209-273 AH)
- Al-Sajistam, Sulaiman bin al-Asha's Abu Dawood
- *Sunan Abbi Dawood.*
- Al-Nasai Imam Abu Abur Rahman Ahmad bin Shuaib, *Sunan Nasain* (215-303 AH)
- Al-Baihaqi (d. 458 AH)
- *al-Sunan al-Kubra* Hyderabad
- Al-Zahabi, Shamsud Din –
- *Siyar Allamin Nubala*
- Ibn al-Juzi, Abul Faraj Abdur Rahman bin Ali
- *Seerat Umar bin al-Khattab.*
- Al-Shibani Imam Muhammad bin Hasan (d. 189 AH) *Siyar Kabir* (Cairo)
- Kandhalawi, Idris, Siratul Mustafa
- Numani Shibli Allama, *Siratun Numan*
- *Numani Shibli Allama*, Siratun Nabi
- Sarakhsi Imam (d. 483)
- *Sharh al-Siyar al-kabir*
- Ali Mansur Misri,
- *Shariatullah wa Shariatul Insan.*
- Al-Bukhari Abu Abdullah Muhammad bin Ismail,
- *Al-Jami al-Sahih lil-bukhari*, 194-256 AH
- *Safa* (quarterly) edited by Md. Rizwan al-Qasim, Saifullah Rahmani.
- Hanbali at-Farra Qazi Md. Abiyala,
- *Tabaqatul Hanabilah* (Darul Ma'arifa Beirut)
- Al-Qarshi Abdul Qadir bin Muhammad, *Tabaqatul Hanafiyah.*
- Al-Tamimi, Taqiaddin bin Abdul Qadir
- *al-Tabaqatus Saniyah fi Tarajim al-Hanafiyah*, published by al-Majlisul a'la li Shu'unil Islamiyah, (Cario)
- Al-Isnawi, Jamalud Din Abdul Rahim al-Shafie,

- *Tabaqatul Shafiyah* (Daril Kutubi Ilmiyah Beirut 1407 AH)
- Gangohi Md. Hanif –
- *Zafarul Muhasilin bi Ahwalil Musannifin.*
- *Aili qawanin per chand itirazat, ek maruzi Jaizah* (published by Universal Peace Foundation, Delhi)
- CA Nol Leno (Itali)
- *Usmani Qanun Umuni wa Khususi* (1865 print)
- Abu Zuhra –
- *Aqdus Zawaj*
- Azimabadi Shamsul Haq,
- *Awnul Mabud fi hall Abu Dawood*.
- Shibli Nomani – Al-Faruq
- Al-walwaliji Abul Fath Zahirud Din Abdur Rashid bin Abu Hanifa Ibn Abul-Razzaq,
- *Fatawa al-wal-Wahijiah ma Muqaddima Shaikh Miqdad bin Musa Faridh.* (Darul Iman Saharanpur 2006)
- Ibn Taimiyah Sahikul Islam,
- *Al-Fatawa*.
- Mulla Nizam et all –
- *Fatawa Alamgiri*.
- Ibn Hammam Kamaluddin –
- *Fathul Qadir*.
- Asqalani Hafiz Ibn Hajar
- Maraghi Mustafa Abudllah
- *Fathul Bari on al-Bukhari*
- Subhi Dr
- *al-Fathul Mubin fi Tabaqatil Usuliyeen.*
- Mahmasani Falsafatus Tashri fi Islam.
- Peiten *: Falsafa-e-Qanun.*
- Hasan Farooq Dr,
- *Fanne-Urdu Fiqh ki Tarikh ahde Risalat re ahde hazir tak*, Pub. Darul Isha'at, Karachi, 2006.
- Lucknawi Abul Hasan al-Muhammad Abdul Hay
- *al-Fawaidul Bahiya fi Tarajim al-Hanafiyah.*
- The Holy Quran Khair Kathir Press Karachi, Filler, *Qanun Khudap ni talash me* (print, 1950)
- Abn al-Lajam Hanbali Dimashqi Abul Hasan Allaudin, Ali bin Muhammad bin Ali al-Ba'ali (d. 803 AH)

- *al-qawaid wal-Fawaid al-Usuliyah*.
- Al-Maliki, Ibn Jazri, Qawani al-Ahkam is Shariyah wa masailil furooil fiqhiyah, Darul Ilm Beirut.
- Abu Yusuf, Imam (113-182 AH)
- *Kitabul Kharaj*.
- Shafie, Imam
- *Kitab al-Umm*, (Dar al-Fikr, Beirut)
- Ibn Nadim Md. Bin Yaqab,
- *al-Fihrist* (Karachi)
- Hambali, Ibn Pajab (d. 750) al-Zailala Tabaqatil Hanabilah, Beirut, Darul Ma'arifa.
- Zamakhshari, Jarullah (d. 538 AH)
- *al-kashaf an haqaiq al-Tanzil*.
- Thanawai, Md. Ala al-Faruqi,
- *Kashaf Istilahatil Funoon* (mu'assassa al-misriyah 1963)
- Al-Aim, Badrud Din (d.855 AH)
- *Kashful Qara an Muhinmatil Asani wal-Kuna* (Print Jamia al-Malik Abdul Aziz Jeddah 1994)
- Haji Khalifa, Mustufa bin Abdullah, known as Mulla Katib Chalpi (d. 1067 AD)
- *Kashfuz – Zunun n Asamil Kutubi wal funun*.
- Hindi Ali bin Husamud Din-Kanqul Ummal fi Sunnaril aqwal wal afa'l
- Fridemann – Legal Theory
- Al-Sarkhasi Shamsul Ayimmah Md. Bin Ahmad bin Abi Sahl (d. 483 AH)
- *Al-Mabsut al Sa'adah*, Egypt (1324 AH)
- Al-Haithami Ali bin Abu Bakr (d. 807 AH)
- *Majmau-Zawaid*.
- Md. Ali Imam Dr.
- *Muhazarat Fi Nazriyatil Qanun*.
- Al-Hafid Md. Bin Rushd Abul Wahid (520-595 AH) *Mukhtasar al-Mustasfa lil-Ghazali*.
- Al-Zarqa Mustafa Ahmad,
- *al-Madkhal lit-Tarif bil Fiqh*.
- Tantawi Mahmood Muhammad
- *al-Madkhal lil Fiqhil Islami*, Darul Nihzah, Cairo 1978.
- Faraj Tawfiq Dr,
- *al-Madkhal lil Uloomil-Qanuniyah*.
- Pasha Ahmad Taimoor,

- *al-Madahibul Fiqhiyah al-Arba'ah.*
- Hanafi Mulla Ali Qari Ali bin Sultan (d. 1014 AH) *Mirqatul Mafatih ala Mishkatil masabih.*
- Al-Neshapuri Abu Abdullah
- *al-Hakim al-Mustadrak.*
- Al-Neshapuri Imam Muslim al-Qushairi,
- *Muslim Sharif.*
- Gold Zeher-
- *Muslim Studies.*
- Hambal Imam Ahamd,
- *Musnad Ahmad.*
- Abu Abdullah Md. Bin Abdullah (d. 737 AH)
- *Mishkatul Masabih.*
- Al-Hamwi Shaikh Abi Abdullah Yaqut bin Abdullah *Mujamul-Buldan.*
- Kahhala Umar Raza,
- *Mujam al-Usulien*, Umul Qura University 1414 AH.
- Baqa Md. Mazhar,
- *Mujamul-Mu'alifin*, Maktab al-Arabiya Damascus 1957.
- Qilaji Md. Rawwas Dr, Hamid Sadiq Qainabi
- *Mujarn Lughatil Fuqaha* (Arabic-English) Dar-al-Nafais Beirut 1985.
- Al-Jawaliqi, al-Baghdadi Abu Mansur- Mauhoob bin Abu Tahir Ahmad (d. 405 AH)
- *Al-Mu'arrab.*
- Ibn Qudama Muwaffaq –
- *Al-Mughni*, al-Manar press Egypt-1347 AH
- Al-Ashqar Umar Sulaiman Dr.
- *Maqasidul-Makallafin.*
- Shibli Nomani
- *Maqalate Shibli.*
- Ibn Khaldum Abdur Rahman bin Muhammad *Muqaddama Ibn Khaldin.*
- Abu Zuhra
- *Muqaddamatul Milkiyah wa Nazriyatul aqd* (Egypt)
- Nadwi Sulaiman Sayyid (1967 edition).
- Al-Zawawi Qazi Isa bin Masud
- *Munaqibul Imam Malik bin Anas* print, Maktaba Tayyiba, Madina Munawwarah 1990.

- Ibnul Athir al-Jazri Abu Sa'adat Majdud Din al-Mubarak bin Muhammad, bin Muhammad bin Abdul Karim *Manaqibul – Imam al-Shafie* Mu'assaratu Uloomil Qur'an 1990.
- Al-Makki al-Muwaffaq bin Ahmad
- *Manaqibul Imam Abi Hanifa.*
- Al-Kurdi Hafizud Din Md. Ibn Bazzar,
- *Manaqibul Imam Abia Hanifa.*
- Faruqi Shujaud Din Alig
- *Muntakhab Dashtir ka Taqabuli Mutala'ah.*
- *Min Simaril Fikr* Qatar University (1404)
- *Al-Mausuatul Fiqhiyah al-Kuwaitiyah,* published by Ministry of Awqaf, Kuwait.
- Imam Malik bin Anas,
- *Al-Mu'atta.*
- Jamalud Din Abul-Mahasin Yusuf,
- *al-Najumuz-Zahirah fi Muluki Mir wal-Qahirah*.
- Al-Husaini Abdul Haibin Fakhrud Din
- *al-Ilam bi-man fi Hind min la-a'alam*.
- Al-Zilai, Jamalud Din Abu Muhammad Abdullah bin Yusuf,
- *Nasbur Rayah.*
- Shukani Md. Bin Ali
- *Nail al-Awtar fi sharh Muntaqal-Akhbar*.
- Ibn Khallikan (d. 681 A.H.)
- *wafayatul a'ayan wa ambaiz Zaman*.
- Al-Marghinani Burhanud Din (511-583 AH)
- Al-Baghdadi Ismail Pasha (d. 1339 AH)
- *Hadyatul Arifin*, Darul Fikr 1982
- Pandey B.N. Dr.

Hindu Mandir awr Aurang Zeb ke Faranin, Maulana Azad Academy, Delhi.